



Procedural Rights and Detention Conditions

Cost of Non-Europe Report

STUDY

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The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions

Study

Abstract

Despite the significant EU action and cooperation that has taken place, the rights and detention conditions of those suspected of committing a crime and serving a sentence in the Member States continue to fail to live up to international and EU standards. Judicial cooperation within the EU is not yet fully adapted to this reality, it operates in absence of an EU mechanism monitoring Member States' compliance with practical fundamental rights and lacks specific guidance for alleged violations.

EU legislation on suspects' rights is limited to setting common minimum standards. Even so, there are already indications of shortcomings concerning key rights to a fair trial, such as the right to interpretation, translation, information and legal assistance during questioning by the police. Furthermore, certain areas have not been comprehensively addressed, such as pre-trial detention, contributing to prison overcrowding in a number of EU Member States. The outstanding divergent levels of protection also create discrimination between EU citizens.

Criminal justice systems remain inefficient and fail to achieve the aims of convicting and rehabilitating the guilty, while protecting the innocent. This impacts on the individuals concerned, in terms of a denial of their rights and material and immaterial damage; on their families; and on Member States' societies more generally. The gaps and barriers identified also have substantial cost implications.

Finally, this study assesses the added value of a number of options for EU action and cooperation to contribute to closing these gaps and taking further steps to ensure the effective protection of the rights of suspects and detained persons.

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Background and methodology

The notion of the 'cost of non-Europe' was introduced by Michel Albert and James Ball in a 1983 report commissioned by the European Parliament. It was also a central element of a 1988 study carried out for the European Commission by the Italian economist Paolo Cecchini on the cost of non-Europe in the single market.¹ This approach was revisited in a cost of non-Europe in the single market report of 2014.² In the latest Interinstitutional Agreement on Better Law-making it was agreed that analysis of the potential 'European added value' of any proposed Union action, as well as an assessment of the 'cost of non-Europe' in the absence of action at Union level, should be fully taken into account when setting the legislative agenda.³

Cost of non-Europe (CoNE) reports are designed to examine the possibilities for gains and/or the realisation of a 'public good' through common action at EU level in specific policy areas and sectors. They attempt to identify areas that are expected to benefit most from deeper EU integration, and for which the EU's added value is potentially significant.

On 4 October 2016, coordinators of the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested that the European Added Value Unit within the European Parliamentary Research Service (EPRS) produce a report on the cost of non-Europe in the Area of Freedom, Security and Justice. In response to that request, the European Added Value Unit is preparing a report, which will give an overview of the current state of play in the main policy areas covered by the Area of Freedom, Security and Justice (AFSJ) within the competence of the LIBE Committee. The report will map the current gaps and barriers and estimate their impacts in the establishment of this area. Those impacts will be measured in terms of both economic impacts and impacts on individuals in terms of protecting their fundamental rights and freedoms.⁴ Finally, it will provide options for action at EU level to address the identified

¹ See Commission on the European Communities, Europe 1992, the Overall Challenge, SEC (1988) 524.

² [The Cost of Non-Europe in the Single Market](#), Cecchini Revisited, An overview of the potential economic gains from further completion of the European Single Market, EPRS, European Parliament, September 2014.

³ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1-14.

⁴ C. Moraes, [A Europe of Costs and Values in the Criminal Justice Area](#) in: EUCRIM 2016/2, p. 88: 'Nowadays, in the context of global economic and humanitarian crises, many voices are questioning the role and the very existence of the Union. It is therefore time to look back on Professor Cecchini's report and reflect on the cost of non-Europe in the area of freedom, security and justice in order to calculate its economic value -not always an easy task- and the cost to citizens in terms of their fundamental rights and freedoms'.

gaps and barriers together with an estimation of their potential costs and benefits.

The following areas will be covered in the report:

1. Asylum, migration, border control;
2. Police and judicial cooperation in the fight against crime and terrorism; and
3. Fundamental rights.

A number of relevant studies have already been published covering the added value of an EU mechanism to monitor and enforce democracy, the rule of law and fundamental rights in the Member States and within EU institutions,⁵ and the benefits of further EU action and cooperation to ensure free movement within the Schengen Area,⁶ as well as enhanced police and judicial cooperation in the fight against organised crime and corruption.⁷ A briefing summarising the interim results was produced in October 2017.⁸

This cost of non-Europe report focuses on EU action and cooperation concerning the rights of individuals in criminal procedure, with an emphasis on suspects' rights and the rights of detainees, both pre- and post-trial and in the context of judicial cooperation in criminal matters.

It seeks to answer the following questions:

1. What are the gaps and barriers in EU action and cooperation in the area of procedural rights and detention conditions?
2. What are the economic impacts and impacts of those gaps and barriers at individual level in terms of protecting fundamental rights and freedoms?
3. What are the potential costs and benefits of options for action at EU level that could address the gaps and barriers identified?

The report concentrates on the 2009 'Roadmap' on the rights of suspects⁹ and European Commission follow up proposals leading to directives on interpretation and translation, the right to information and access to a lawyer in

⁵ W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, October 2016.

⁶ W. van Ballegooij, [The Cost of Non-Schengen: Civil Liberties, Justice and Home Affairs aspects](#), EPRS, European Parliament, September 2016.

⁷ W. van Ballegooij, T. Zandstra, [The Cost of Non-Europe in the area of Organised Crime and Corruption](#), EPRS, European Parliament, March 2016.

⁸ W. van Ballegooij, [Area of freedom, security and justice: untapped potential](#), EPRS, European Parliament, October 2017.

⁹ [Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#), OJ C 295/1 of 4.12.2009.

criminal proceedings, as well as directives on the presumption of innocence, the rights of child suspects and legal aid in criminal proceedings.¹⁰ The Commission green paper on detention conditions¹¹ and its follow up in terms of a potential directive on pre-trial detention are also discussed.

EU judicial cooperation measures with a direct impact on procedural rights or related to detention conditions in the Member States also fall within the scope of this study. This includes the framework decisions on the European arrest warrant, transfer of prisoners, the European investigation order, the European Supervision Order and the Framework decision on probation and alternative sentences.¹² Detention conditions more generally also come within the scope of this study.

This study does not cover the prevention and settlement of conflicts of exercise of jurisdiction in criminal matters and the transfer of proceedings within the EU.¹³ The European Law Institute recently proposed three legislative policy options,¹⁴ for filling the gaps in the current EU legislative framework,¹⁵ which lacks binding rules preventing conflicts of jurisdiction and mechanisms to solve conflicts of jurisdiction when parallel proceedings already exist in two or more Member States. It also fails to provide an effective remedy for the defendant. The proposals' added value is discussed both from the perspective of strengthening the fundamental right of those living in the AFSJ and ensuring the good administration of justice.

¹⁰ [Directive on the Right to Interpretation and Translation](#) (OJ L 280, 26.10.2010, p. 1-7); [Directive on the Right to Information in criminal proceedings](#) (OJ L 142, 1.6.2012, p. 1-10); [Directive on the Right of Access to a Lawyer in criminal proceedings](#) (OJ L 294, 6.11.2013, p. 1-12); [Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#) (OJ L 65, 11.3.2016, p. 1-11); [Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings](#) (OJ L 132, 21.5.2016, p. 1-20); [Directive on Legal Aid](#) (OJ L 297, 4.11.2016, p. 1).

¹¹ European Commission, [Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), COM (2011) 327.

¹² [Framework Decision on the European Arrest Warrant](#) (OJ L 190, 18.7.2002, p. 1-20); [Framework Decision on the Transfer of Prisoners](#) (OJ L 327, 5.12.2008, p. 27-46); [Framework Decision on the European Supervision Order](#) (OJ L 294, 11.11.2009, p. 20-40); [Framework decision on Probation and Alternative Sentences](#) (OJ L 337, 16.12.2008, p. 102-122).

¹³ Cf. [Council of Europe Convention on the Transfer of Proceedings in Criminal Matters](#), E.T.S. no. 73.

¹⁴ European Law Institute, [Draft Legislative Proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union](#), 2017.

¹⁵ Cf. [Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings](#) (OJ L 328/42 of 15.12.2009); [Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings](#), COM (2014) 313, p. 11; A. Klip, *European Criminal Law, An integrative approach*, 3rd edition, Intersentia, 2016, pp. 450-456.

The rights of victims and witnesses are covered to some extent in this study, given that the Directive on the right of access to a lawyer in criminal proceedings provides protection for people who become suspects during questioning.¹⁶ The European Commission is due to submit a transposition report on Victims' Rights Directive.¹⁷ The European Parliament is also preparing an implementation report,¹⁸ based on a European Implementation Assessment by the European Parliamentary Research Service (EPRS). The European Parliament has called on the Commission to legislate in the area of witness and whistleblower protection on several occasions, including in its resolution on the fight against corruption and the follow-up of the Special Committee on Organised Crime, Corruption and Money Laundering (CRIM) resolution.¹⁹ As regards witnesses, the Commission has examined the feasibility of EU legislation,²⁰ but argues the matter is sufficiently covered by the Victims' Rights Directive.²¹ The Commission is currently assessing the scope for horizontal or further sectoral action at EU level in the area of whistleblower protection.²²

In terms of methodology, the report mainly relies on desk research, which includes comparative studies on Member States' legal systems, and reports on their implementation of relevant EU law. EPRS also commissioned a research paper from RAND Europe, which conducted desk research and interviews with relevant stakeholders and quantified the impacts of gaps and barriers in the area, where feasible and appropriate. This research paper is annexed to this cost of non-Europe report.

¹⁶ [Directive on the Right of Access to a Lawyer in criminal proceedings](#) (OJ L 294, 6.11.2013, p. 1-12), article 2(3).

¹⁷ [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime](#), and replacing Council Framework Decision 2001/220/JHA, Article 29, OJ L 315, 14.11.2012, p. 57-73.

¹⁸ [Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime](#) (2016/2328/INI).

¹⁹ [European Parliament resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution](#) (2015/2110(INI)), P8_TA(2016)0403, para 18(c), (d); [European Parliament resolution of 14 February 2017 on the role of whistle-blowers in the protection of EU financial interests](#) (2016/2055(INI)), P8_TA(2017)0022; W. van Ballegooij, T. Zandstra, [The Cost of Non-Europe in the area of Organised Crime and Corruption](#), EPRS, European Parliament, March 2016.

²⁰ [Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice](#), COM (2007)0693.

²¹ [Follow-up to the European Parliament resolution of 25 October 2016 on the fight against corruption and follow-up of the CRIM resolution](#), SP (2017) 54, p. 5: 'Although the Victims' Rights Directive does not deal with rights of witnesses as such, it is expected that in practice it will have a positive impact on witness as well. In fact, many victims of crime, including victims of organised crimes, become witnesses. Such people keep their rights as victims, including their special rights as vulnerable victims to protection against victimisation, retaliation and intimidation'.

²² European Commission, [Public consultation on whistleblower protection](#) (closed 29 May 2017).

Executive summary

Effective defence rights require a democratic legal order based on the rule of law, which protects fundamental rights. They furthermore demand criminal procedures that enable defence rights to be exercised practically and effectively, as well as a consistent level of competence among legal professionals, underpinned by appropriate professional cultures. Detention should be a measure of last resort. Detention conditions need to be humane and facilitate the rehabilitation of offenders, including efforts to prevent radicalisation in prisons.

EU action and cooperation in these areas has taken place in a wider framework at United Nations (UN) and Council of Europe (CoE) level. Action at EU level has been taken with the aim of developing an EU Area of Freedom, Security and Justice. Secondary legislation has been adopted to support judicial cooperation based on the principle of mutual recognition. Furthermore, directives on the rights of suspects were adopted to enhance fundamental rights and facilitate the exercise by EU citizens of their rights to free movement and residence.

Despite these developments, the rights and detention conditions of those suspected of committing a crime in EU Member States continue to fail to comply with international and EU standards, including EU citizenship rights. European Court of Human Rights (ECtHR) judgments are not properly executed and recommendations by specialised bodies established in accordance with UN and CoE treaties are not implemented by the Member States. Judicial cooperation within the EU is not adapted to this reality, resulting in efficiency and fundamental rights gaps.

Here, the stronger enforcement power of the EU, notably the possibility for the European Commission to begin an infringement procedure against Member States for failure to comply with EU law, is a plus. There are however, open-ended questions as regards the EU's ability to tackle systemic violations of the rights and values listed in Article 2 of the Treaty on European Union (TEU).

Furthermore, EU legislation is limited to setting common minimum standards to the extent they are necessary to facilitate law enforcement cooperation based on the principle of mutual recognition; it does not therefore offer a uniform level of protection. It also needs to take into account the differences between the legal traditions and systems of the Member States. As a result, these measures have mostly consolidated ECtHR judgments in EU law. Even so, there are already indications of implementation gaps concerning key rights to a fair trial, such as the right to interpretation, translation, information and legal assistance during questioning by the police.

In addition, certain areas have not been comprehensively addressed, such as pre-trial detention (PTD), which in too many cases, is not imposed as a measure of last resort. Alternatives, such as supervision measures, including through the framework decision on the European Supervision Order in cross border cases, are underused. An excessive number of pre-trial detainees is one of the main factors leading to prison overcrowding in some EU Member States.

Individuals may suffer inappropriate treatment at all stages of criminal proceedings (questioning, prosecution and sentencing). This could lead to increased legal costs, detrimental effects on employment, education, private and family life, as well as immaterial impacts on the individual's mental and psychological health. Detention may expose the individual to maltreatment and violence, with a particular impact on vulnerable groups. RAND estimates that pre-trial detention has an economic cost of approximately €1.6 billion per year for EU Member States. Depending on the scenario, this amount could be reduced by either €162 million per year (reduction of average length of time spent in detention and level of individuals in PTD at any given point in time to the EU average), or €707 million per year (number of individuals held in PTD reduced in each Member State by the average proportion of people on trial who are acquitted in a given country). Overcrowded prisons have a detrimental effect on the physical and mental health of prisoners, as well as increasing suicide rates. It also undermines their rehabilitation prospects, including attempts to prevent radicalisation in the fight against terrorism.

Options for action and cooperation at EU level that could address the identified gaps and barriers include:

- Ensuring better compliance with international obligations, chiefly through EU accession to the European Convention on Human Rights ECHR, the reinforcement of international monitoring mechanisms and the enforcement of ECtHR decisions in the Member States;
- Ensuring compliance with the values of democracy and the rule of law, as well as fundamental rights within the Union via a dedicated EU monitoring report and policy cycle, in line with Parliaments demands;²³
- Ensuring proper implementation of EU legislation, for instance concerning pre- and post-trial supervision measures offering alternatives to detention, both through guidance documents, training and infringement procedures;
- Reviewing existing EU legislation to ensure better fundamental rights compliance, notably the Framework Decision on the European Arrest

²³ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), [P8_TA\(2016\)0409](#).

Warrant, as demanded by Parliament,²⁴ and the Framework Decision on Transfer of Prisoners, with options for targeted or comprehensive revision of the Suspects' Rights Directives to be considered after their transposition deadlines expire;

- Taking further action at EU level, including enacting new EU legislation. As regards pre-trial detention, there is sufficient evidence for the added value of EU action, even if there is no political will to proceed at present. EU competence to adopt legislation on detention conditions post-trial is contested. Nevertheless, common action is required as judicial cooperation measures, especially those involving the transfer of suspected and convicted persons, presume adequate detention conditions.²⁵

Further action and cooperation at EU level would lead to better compliance with EU values and rights, would meet the expectations of EU citizenship in the criminal justice area, would improve mutual trust between judicial authorities based on respect for fundamental rights, and finally would result in cost savings for the Member States.

²⁴ European Parliament [resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant](#) (2013/2109(INL)), P7_TA(2014)0174.

²⁵ European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA-PROV\(2017\)0385](#), para. 3.

1. State of play, gaps and barriers in EU action and cooperation in the area of procedural rights and detention conditions

Key findings

- Suspects' rights and detention conditions in EU Member States continue to fail to comply with international and EU standards. In 2016 alone the European Court of Human Rights found 86 EU Member State violations related to inhuman and degrading treatment. In absence of a specific EU democracy, rule of law and fundamental rights monitoring and policy cycle called for by the European Parliament, judicial authorities cannot rely on a systematic assessment of procedural rights and detention conditions in the other EU Member States.
- The absence of an explicit ground for non-execution that can be invoked in cases where judicial cooperation might expose the individual to fundamental rights violations. In this regard, the disproportionate use of the European Arrest Warrant has been a particularly longstanding issue of concern. Transfer of prisoners within the EU does not require consent of the individual if the prisoner is to be returned to their Member State of origin. This leads to a gap in protection and might harm social rehabilitation prospects. Framework decisions providing alternatives to detention in the pre-trial and sentencing phase are underused.
- EU measures on suspects' rights have mostly consolidated ECtHR judgments in EU law. There are already indications of implementation gaps concerning key rights to a fair trial, such as the right to interpretation, translation, information and legal assistance during questioning by the police. Pre-trial detention is currently not covered by EU legislation. In practice, it is not always imposed as a last resort and is disproportionately imposed on foreign suspects due to a presumed risk of flight. At present, an average 20 % of prisoners in the EU are in pre-trial detention. Furthermore, EU citizens continue to experience significant differences in criminal procedures and detention conditions within the EU.

The EU works towards achieving common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspects and accused persons are sufficiently protected.²⁶ Effective defence rights require a democratic legal order based on the rule of law, which protects fundamental rights, criminal procedures that enable defence rights to be practically and

²⁶ As stated on the European Commission Directorate General for Justice [website](#).

effectively exercised and a consistent level of competence among legal professionals, underpinned by appropriate professional cultures.²⁷ Being held in detention – either pre-trial or as part of a sentence – directly affects a range of fundamental rights to liberty, family and privacy. Detention should only be imposed as a measure of last resort. Furthermore, international fundamental rights standards impose an obligation on Member States to respect human dignity and prohibit inhuman and degrading detention conditions. This includes requirements regarding personal living space in prison, health care, good order, management and staff, inspection and monitoring, as well as specific conditions for prisoners in pre-trial detention and sentenced persons.

However, suspects' rights and detention conditions in EU Member States still fail to comply with international obligations, and EU standards and gaps and barriers in action and cooperation at EU level continue to exist. The state of play as regards international and EU action is described in the following paragraphs.

1.1. International standards

EU action and cooperation in the areas of procedural rights and detention conditions takes place in a wider framework of action at UN and Council of Europe (CoE) level.²⁸ The UN International Covenant on Civil and Political Rights (ICCPR) covers defence rights,²⁹ whereas the UN Convention Against Torture is of importance regarding detention conditions. This Convention has an optional protocol (OPCAT),³⁰ in accordance with which State Parties have to set up national preventive mechanisms (NPMs). NPMs consist of experts who regularly examine the treatment of the persons deprived of their liberty in places of detention with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment. For this

²⁷ Inspired by E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, Intersentia, Antwerp-Oxford-Portland 2010, who argue on p. 5, 6, that 'the assessment of access to effective criminal defence in any particular jurisdiction needs to be addressed at three levels: a) whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights taking ECtHR jurisprudence, where it is available, as establishing a minimum standard; b) whether regulations and practices are in place that enable those rights to be "practical and effective"; c) whether there exists a consistent level of competence among criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned with processes as well as outcomes and in respect of which perceptions and experiences of suspects and defendants are central'.

²⁸ For a more detailed overview of international standards see [Prison conditions in the Member States: selected European standards and best practices](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2017.

²⁹ [International Covenant on Civil and Political Rights](#), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

³⁰ [Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment](#), adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199.

purpose, they can make recommendations to national authorities, including legislative proposals. Currently 24 NPMs carry out monitoring visits to places of detention in the EU. A recent Commission funded project called for further engagement between NPMs and the judiciary as a mean of improving detention conditions within Member States and strengthening mutual trust between judicial authorities.³¹

The CoE Convention on Human Rights (ECHR)³² is of particular importance, since after exhausting domestic remedies, it offers individuals the possibility to apply to the European Court of Human Rights (ECtHR) regarding alleged violations of ECHR rights. This includes the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3 ECHR), the right to liberty (Article 5 ECHR) and to a fair trial (Article 6 ECHR).³³ Concerning detention conditions, the CoE also adopted European Prison Rules,³⁴ which consist of a number of recommendations on conditions of imprisonment, health care, good order, management and staff. Though the European Prison Rules are not formally binding, the ECtHR has referred to them, notably in cases concerning alleged violations of Article 3 ECHR, thereby affording them a quasi-legal character.³⁵

In 2016 alone, the ECtHR found 86 EU Member State violations related to inhuman and degrading treatment.³⁶ The Court also found 61 EU Member State violations of the right to liberty and 74 violations of the right to a fair trial.³⁷ ECtHR decisions are binding and in addition to any pecuniary compensation, may require the state found in violation of the ECHR to adopt individual and general measures. The execution of ECtHR decisions is the responsibility of the CoE Committee of Ministers (CM).³⁸ In its latest resolution on the implementation of ECtHR judgments, the CoE Parliamentary Assembly (PACE)³⁹ expresses its 'deep concern' regarding the number of judgments pending before the CM (almost 10 000), including leading cases – revealing specific structural

³¹ Tomkin et al., [The future of mutual trust and the prevention of ill-treatment, judicial cooperation and the engagement of national preventive mechanisms](#), Ludwig Boltzmann Institute, Vienna, Austria, 2017, p. 8, 9.

³² [European Convention on Human Rights](#).

³³ [European Court of Human Rights](#).

³⁴ [Recommendation Rec\(2006\)2 of the Committee of Ministers to Member States on the European Prison Rules](#).

³⁵ Cf. RAND 2017, chapter 4, section I.

³⁶ Council of Europe, [ECHR violations by Article and by State](#).

³⁷ European Court of Human Rights, [violations by article and by State-2016](#).

³⁸ [Committee of Ministers](#).

³⁹ [PACE](#).

problems.⁴⁰ It called on the European Parliament to engage with PACE on issues related to the implementation of the Court's judgments.⁴¹

The Council of Europe Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has a dedicated monitoring committee (CPT).⁴² The CPT ensures compliance with the provisions of the Convention through regular visits to places of detention, followed by reports to the State concerned with its findings and recommendations. These reports are in principle confidential, though the State may request publication together with its response. In case the State fails to cooperate or follow up to the CPT's recommendations, the latter may decide to make a public statement.⁴³

A particular issue identified by the CoE and CPT specifically is prison overcrowding, mainly caused by the excessive use and duration of pre-trial detention. The annual penal statistics produced by the CoE make clear that 9 of 28 EU Member States had a prison occupancy rate of over 100 % in 2015.⁴⁴ The CPT has developed standards for personal living space in prison establishments.⁴⁵ On average 20 % of prisoners in the EU are pre-trial detainees, spending on average 165 days in detention.⁴⁶ In its latest annual report, the CPT reiterates that pre-trial detention should only be used as a measure of last resort and that non-custodial alternatives, such as regular reporting to the police and electronic monitoring should be applied as far as possible. It also stresses that being a non-resident is not a sufficient condition to detain the person on the assumption that the person might flee the country and thereby escape justice.⁴⁷

1.2. EU action and cooperation

The European Union has acted in a number of areas related to the procedural rights of suspects and accused persons and detention conditions, in particular to:

- support judicial cooperation;

⁴⁰ CoE Parliamentary Assembly, [The implementation of judgments of the European Court of Human Rights](#), Resolution 2178 (2017), paragraph 5.

⁴¹ CoE Parliamentary Assembly, [The implementation of judgments of the European Court of Human Rights](#), Resolution 2178 (2017), paragraph 11.

⁴² [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#).

⁴³ An example concerns the public statement issued on Belgium in 2017 regarding its failure to put in place a minimum level of service to guarantee the rights of inmates during periods of industrial action by prison staff, see [Council of Europe anti-torture Committee issues public statement on Belgium](#), CPT, 13 July 2017.

⁴⁴ Aebi, M. F., Tiago, M. M. & Burkhardt, C. 2017. [SPACE I](#) Council of Europe Annual Penal Statistics: Prison population survey 2015, p. 47; RAND 2017, chapter 4 section II.

⁴⁵ [Living space per prisoner in prison establishments: CPT standards](#), CPT/Inf. (2015) 44, Council of Europe, Strasbourg, 15 December 2015.

⁴⁶ RAND (2017), chapter 5, section IV.

⁴⁷ [26th General Report of the CPT, 1 January-31 December 2016](#), Council of Europe, April 2017, p.32.

- enhance fundamental rights; and
- facilitate the exercise of EU citizens' rights to free movement and residence.⁴⁸

To understand the objectives of the Union action and cooperation in this area one needs to go back to problems that countries faced in achieving the cross border recognition and execution of judicial decisions in criminal matters, such as a decision to prosecute a person or issue a warrant for a fugitive convict.⁴⁹ These problems have a long history in international and European criminal justice cooperation.⁵⁰ Extradition procedures have traditionally been slow and thwarted by conditions and exceptions based on national sovereignty. Parties were for instance still allowed to refuse cooperation in cases concerning their nationals (nationality exception),⁵¹ in case the acts could be perceived as political offences,⁵² or in case the acts would not be punishable under their own jurisdiction (dual criminality requirement).⁵³ Another ground for refusal to extradite, developed in ECtHR case law, is barring extradition in cases where it might result in a flagrant breach of the ECHR, without an effective remedy in the requesting State.⁵⁴

Attempts to constrain the grounds for refusal based on national sovereignty date back to the 1970s, but had limited success.⁵⁵ Notably, at the Brussels European Council of 5 December 1977, French President Valéry Giscard D'Estaing launched the idea of creating a 'European judicial area among the Community Member States based on the idea of shared sovereignty in, and shared responsibility for, the free movement of persons within the Community's Single Market'. At the time, not all Member States were ready to take such big steps in European integration. Later in the 1990s, however, a number of Member States did agree to simplify extradition procedures between them in the Schengen Convention Implementation Agreement.⁵⁶

⁴⁸ In accordance with the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 of 4 December 2009.

⁴⁹ For a more extensive overview see W. van Ballegooij, *The Nature of Mutual Recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia, 2015, chapter 3.2.

⁵⁰ Cf. A. Klip, *European Criminal Law, An integrative approach, 3rd edition*, Intersentia, 2016, chapter 8 (bilateral cooperation in criminal matters).

⁵¹ European Convention on Extradition (ECE), E.T.S. No. 24, Art. 6(1) (a).

⁵² ECE, Art. 3.

⁵³ ECE, Art. 2.

⁵⁴ ECtHR, Case No. 1/1889/161/217, *Soering v UK*, 26 June 1989.

⁵⁵ E.g. First Additional Protocol to the ECE, E.T.S. No. 86; CoE Convention on the Suppression of Terrorism, E.T.S. No. 90.

⁵⁶ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22 September 2000 p. 19-62.

Respect for fundamental rights has been a concern from early Court of Justice case law, as the impact of European integration on fundamental rights as protected under domestic and international law became apparent.⁵⁷ Since the entry into force of the Maastricht Treaty, there has been an express reference in the Treaty indicating that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.⁵⁸

The Maastricht Treaty also introduced EU citizenship, which provides a right to move and reside freely within the territory of the Member States without facing discrimination on grounds of nationality.⁵⁹ Consequently, national measures restricting free movement and residence have faced increasing scrutiny as regards their impact on the 'genuine enjoyment of the substance of these rights'.⁶⁰

Since the entry into force of the Treaty of Amsterdam in 1999, the EU offers its Citizens an 'Area of Freedom, Security and Justice (AFSJ) without internal frontiers'⁶¹ and 'with respect for fundamental rights'. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States does not however contain any specific rights for EU citizens in the criminal justice area.⁶² The Court of Justice has nevertheless since confirmed that EU citizenship rights also apply in the context of extradition procedures.⁶³

Judicial cooperation in criminal matters, where individual fundamental rights are directly at stake, cannot function when there are systemic violations and serious concerns regarding the independence of judicial authorities. In accordance with Article 2 (TEU), the Union and its Member States subscribe to respect for the values of democracy, the rule of law and fundamental rights. However, there is a gap between the proclamation of these rights and values and the compliance in accordance with the procedure envisaged in Article 7 TEU. This is why the European Parliament has called for a dedicated EU monitoring and policy cycle to overcome this gap.⁶⁴

⁵⁷ ECJ Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; ECJ Case 4/73, *Nold* [1974] ECR 491.

⁵⁸ Currently Article 6 TEU; F. Ferraro and J. Carmona, [Fundamental Rights in the European Union, The role of the Charter after the Lisbon Treaty](#), EPRS, European Parliament, March 2015.

⁵⁹ In accordance with Articles 18, 20, 21 TFEU and 45 of the Charter of Fundamental Rights of the European Union.

⁶⁰ CJEU Case C-184/99, *Grzelczyk* [2001] 6193, para. 31; Case C-413/99, *Baumbast and R* [2002] ECR5 7097, para. 82; CJEU Case C-34/09, *Zambrano* [2011] 117, para. 42.

⁶¹ Article 3(2) TEU.

⁶² O.J. L 158/77 of 30 April 2004.

⁶³ CJEU case C-182/15, *Petruhhin*, pending.

⁶⁴ [European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights](#)

In 2000, the EU took a further step to protect fundamental rights by adopting its own Charter of Fundamental Rights (EU Charter) which became binding for Member States when implementing EU law⁶⁵ with the entry into force of the Lisbon Treaty.⁶⁶ The EU Charter recognises, inter alia, the right to liberty and to a fair trial. The meaning and scope of those rights shall be the same as corresponding rights laid down by the ECHR. EU law may however provide more extensive protection.⁶⁷ Member States may go beyond standards set out in EU law. The Court of Justice has however held that such a higher level of protection should not compromise the primacy, unity and effectiveness of EU law, a judgment that met with resistance in certain Member States.⁶⁸

In accordance with the Lisbon Treaty, the EU is now also in the process of acceding to the ECHR.⁶⁹ Accession could avoid possible conflicts in interpretation between the Strasbourg and Luxembourg Courts, which would upset the current status quo, according to which the ECtHR deems fundamental rights protection in the EU 'equivalent' to that under the ECHR.⁷⁰ However, the proposed draft agreement on the accession was found to be incompatible with EU law by the Court of Justice, which raised concerns about respect for the autonomy of EU law and the principle of mutual recognition on which intra EU cooperation is based.⁷¹

1.2.1. Mutual recognition

Judicial cooperation within the EU is based on the premise of mutual recognition – interpreted as free movement – of judicial decisions. This includes the handing over of evidence and wanted persons, based on a presumption that Member States comply with fundamental rights together with the 'necessary approximation of legislation'.⁷² The only exception to mutual recognition is the European Public Prosecutors Office, which was originally perceived to operate within a single legal area covering the territories of the participating Member

[\(2015/2254\(INL\)\)](#), P8_TA(2016)0409; W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, October 2016.

⁶⁵ EU Charter, Article 51.

⁶⁶ O.J. (C 115) 01 of 09 May 2008.

⁶⁷ EU Charter, Article 52 (3).

⁶⁸ Ibid. Art. 53; CJEU case C-399/11, *Melloni* [2013] 107.

⁶⁹ Article 6(2) TEU.

⁷⁰ ECtHR of 30 June 2005, Application No. 45036/98, *Bosphorus*.

⁷¹ CJEU, *Opinion 2/13* of 18 December 2014. Opinion pursuant to Article 218(11) TFEU – draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and TFEU Treaties.

⁷² Presidency Conclusions- Tampere European Council, 15-16 October 1999, Bul. 10/1999, points 33-35; Framework Decision on the European Arrest Warrant, 2002 O.J.(L 190) 1, recital 5.

States.⁷³ The Commission did stress that procedural rights safeguards would have to be improved during the process of applying the principle of mutual recognition to judicial cooperation within the EU.⁷⁴

European arrest warrant

The 9/11 attacks on New York and Washington fundamentally reshaped the policy agenda to implement the AFSJ, placing a stronger emphasis on the security dimension. This resulted in the introduction of fast track extradition procedures to meet the immediate need to fight terrorism more effectively.

The Framework Decision on the European Arrest Warrant (FD EAW) adopted in 2002,⁷⁵ is a judicial decision issued by a Member State with a view to the arrest of and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or execution a custodial sentence or detention order.⁷⁶ The surrender procedure has to be completed within 60 days, with an optional extension of 30 days.⁷⁷

Applying mutual recognition to extradition procedures also implied limiting grounds for refusal based on national sovereignty, such as the dual criminality and nationality exception.⁷⁸ On the latter point, the Commission considered that (within the AFSJ) an EU citizen should face prosecution and sentencing in the locality where an offence was committed within the territory of the EU.⁷⁹ However, Member States were not ready to adopt the Commission's proposal for their entire body of criminal law, opting instead for a list of 32 (serious) criminal offences for which the dual criminality requirement may no longer be verified by the executing judicial authorities as a condition for surrender.⁸⁰ Member States also kept a nationality exception for the execution of sentences.⁸¹

⁷³ Though this ambition was weakened during the negotiations, see [Towards a European Public Prosecutor's Office, Study for LIBE committee](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, 2016, section 3.1; [Council Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office \('the EPPO'\)](#), Council document 9941/17 of 30 June 2017.

⁷⁴ [Communication from the Commission to the Council and the European Parliament, Mutual recognition of final decisions in criminal matters](#), COM (2000) 495 final of 26 July 2000, p, 16.

⁷⁵ 2002 O.J. (L 190) 1.

⁷⁶ FD EAW, article 1(1).

⁷⁷ FD EAW, articles 14-17.

⁷⁸ Communication from the Commission to the Council and the European Parliament-Mutual recognition of Final Decisions in criminal matters, COM (2000) 495 final.

⁷⁹ [Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant](#), COM (2001) 522 final of 19 September 2001.

⁸⁰ FD EAW, article 2(2).

⁸¹ FD EAW, articles 4(6), 5(3).

Transfer of prisoners

Framework Decision 2008/909⁸² complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of recognition of the judgment and execution of the sentence there 'with a view to facilitating the social rehabilitation of the sentenced person'.⁸³ In cases where the judgement is forwarded to the Member State of nationality, the sentenced person has no possibility to appeal against their transfer. This system has been criticised, as it may be disputable whether the person has closer ties with their Member State of nationality and has the best chances of rehabilitation there.⁸⁴

Fundamental rights and efficiency gaps

The Framework Decision on the European Arrest Warrant (FD EAW) is generally recognised as a successful instrument. It has simplified extradition procedures, ensuring that suspected and convicted criminals and terrorists are swiftly brought to justice, even if they flee to another Member State. However, the EAW has also been used disproportionately by certain judicial authorities, for instance, demanding surrender of a person for the execution of a judgement concerning a minor criminal offence. In many such cases, justice could have been served without detaining and surrendering the person. The lack of a specific fundamental rights ground for non-execution in the FD EAW and Framework Decision on Transfer of Prisoners has also led to uncertainty regarding the role of judicial authorities in ensuring that the person will not be subjected to inhuman and degrading detention conditions in the other Member State. This is exacerbated by the fact that there is no mutual recognition of decisions refusing to execute a European Arrest Warrant.⁸⁵

To address the efficiency and protection gaps in the FD EAW, and mutual recognition instruments more generally, in a 2014 resolution based on a legislative initiative report,⁸⁶ the European Parliament called on the Commission

⁸² On the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union (FD Transfer of Prisoners) OJ (L 327) 27 of 5 December 2008.

⁸³ FD Transfer of Prisoners, article 3(1).

⁸⁴ Verbeke, P., De Bondt, W & Vermeulen, G., To implement or not to implement, Mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, Apeldoorn/Antwerpen, MAKLU 2013, p. 28.

⁸⁵ It is up to the issuing Member State to withdraw the Schengen alert. As long as it remains in place, the wanted person is effectively locked in the Member State that refused surrender. This was the case of Peter Tabbers, as summarised on the [website](#) of Fair Trials International.

⁸⁶ European Parliament [resolution of 27 February 2014, with recommendations to the Commission on the review of the European Arrest Warrant](#) (2013/2109(INL)), P7_TA(2014)0174; M. del Monte, Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament legislative own-initiative report (rapporteur: Baroness Ludford, PE 510.979), EPRS, European Parliament; Annex I: A. Weyembergh with the assistance of I. Armada and

to propose several measures to address the identified weaknesses. The European Parliament also called on the Commission to explore the legal and financial means available at Union level to improve standards of detention, including legislative proposals on the conditions of pre-trial detention.⁸⁷

The European Commission response⁸⁸ to Parliament's legislative initiative argued that proposing legislative change would be premature in light of the ability of the Commission to start infringement procedures for incorrect implementation of all mutual recognition measures after December 2014.⁸⁹ It also preferred to use soft tools to ensure proper implementation of the FD EAW, such as the 'Handbook on how to issue and execute a European Arrest Warrant'.⁹⁰ In its reply, the Commission furthermore referred to the development of other mutual recognition instruments 'that both complement the European arrest warrant system and in some instances provide useful and less intrusive alternatives to it' and the ongoing work on 'common minimum standards of procedural rights for suspects and accused persons across the European Union'.

Complementary measures

Measures that complement the FD EAW are the European Supervision Order (ESO),⁹¹ the European Investigation Order (EIO) and the FD on Probation and Alternative Sanctions (PAS).⁹²

European Supervision Order

The ESO, adopted in 2009, should reduce the impact on the life of defendants who are subject to prosecution in another Member State by offering the possibility to await trial in the Member State of residence, subject to supervision measures (such as regular reporting to the police). The main intended added value of the ESO lies in addressing the fact that EU non-nationals are frequently considered a high flight risk and are therefore more likely to be subject to pre-

C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

⁸⁷ European Parliament resolution of 27 February 2014 with recommendations to the Commission [on the review of the European Arrest Warrant](#) (2013/2109(INL)), P7_TA(2014)0174, paragraph 17.

⁸⁸ SP (2014) 447.

⁸⁹ Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 36) on transitional provisions, OJ L 115, 09 May 2008, p. 322-326, article 10.

⁹⁰ Commission notice of 28 September 2017, (2017) 6389 final.

⁹¹ Council Framework Decision 2009/829/JHA of 23 October 2009 [on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention](#), OJ L 294, 11 November 2009.

⁹² Council Framework Decision 2008/947/JHA of 27 November 2008 [on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions](#), OJ L 337, 16 December 2008, p. 102-122; for a more detailed discussion of these framework decisions see RAND 2017, chapter 2.

trial detention measures compared to nationals and residents. In response, the ESO provides judges with an alternative to pre-trial detention.

European Investigation Order

In its 2010 action plan⁹³ implementing the multi-annual Stockholm programme⁹⁴ covering justice and home affairs, the Commission had envisaged a comprehensive regime on obtaining evidence in criminal matters, based on the principle of mutual recognition together with common standards for gathering evidence in criminal matters to ensure its admissibility. However, these initiatives never materialised, as the same year, a group of Member States decided to launch their own initiative that only covered the mutual recognition aspect. Based on this initiative, the Directive on the European investigation order in criminal matters was adopted in 2014.⁹⁵ The European Investigation Order is a standard form that allows one or more specific investigative measures in another Member State with a view to obtaining evidence.⁹⁶ It also deals with the disproportionate use of the EAW. Recital 26 calls on judicial authorities to consider issuing an EIO instead of an EAW in case they would like to hear a person.⁹⁷ During the negotiations, Parliament also successfully insisted on a mandatory proportionality test to be performed by the issuing judicial authority, a consultation procedure in case the executing judicial authority has doubts concerning the proportionality of the investigative measure⁹⁸ and a fundamental rights basis for non-execution.⁹⁹

Probation and alternative sanctions

The Framework Directive on Probation and Alternative Sanctions (FD PAS) enables transfer of a convicted person to a different Member State (typically, but not necessarily, the country of their nationality) and in that state serve a probation order or other alternative sanction imposed by the original issuing state. Proper functioning of the FD PAS could convince sentencing judges that the defendant would be appropriately supervised in another Member State, thereby possibly encouraging judges to use non-custodial sentences. The possible added value of FD PAS is also linked to the implementation of FD ESO. If a person already resides in a different Member State at the pre-trial stage under an

⁹³ COM (2010) 171 final of 20 April 2010.

⁹⁴ Council 17024/09 of 02 December 2009.

⁹⁵ OJ (L30)1 of 01 May 2014.

⁹⁶ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters, OJ (L30) 1 of 1 May 2014.

⁹⁷ EIO, recital 26: With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.

⁹⁸ EIO, article 6.

⁹⁹ EIO, article 11 (f).

ESO and is compliant with its requirements, under the FD PAS, a sentencing judge may consider an alternative sanction to be a more attractive option. To facilitate the implementation of the FD PAS, the Commission supports the creation of several repositories of information and databases with relevant information and contacts.¹⁰⁰

Relationship with detention conditions

The initiatives mentioned above might indeed reduce the number of EAWs, but a significant number will still be issued by judicial authorities in Member States that have systemic and structural problems in the field of detention. In the light of this situation, the Court of Justice was called upon by a German court in the joined cases of *Aranyosi* and *Căldăraru* to interpret Article 1(3) FD EAW. This article states that the FD EAW 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]'. In interpreting this provision in its judgment of April 2016, the Court recalled that Article 51(1) of the Charter demands that Member States respect the Charter when implementing EU law, including Article 4 regarding the prohibition of inhuman or degrading treatment or punishment.¹⁰¹ The Court established a two-prong test for the executing judicial authority to consider evidence with respect to deficient detention conditions in the issuing Member State generally and the real risk of inhuman or degrading treatment of the requested person in the event of his surrender to that Member State. If, following consultation with the issuing judicial authority, the risk of such fundamental rights violation cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.¹⁰²

However, in the absence of the specific EU democracy, rule of law and fundamental rights monitoring and policy cycle called for by the European Parliament,¹⁰³ judicial authorities cannot rely on a systematic assessment of detention conditions in other EU Member States. Instead, they might be tempted to rely on individual assurances by the issuing judicial authorities and Member States. However, courts lack the capacity to enforce these in practice. Relying on assurances also leads to the problem that one creates two classes of EU citizens, those detained in adequate conditions because they were surrendered from

¹⁰⁰ See, e.g. the [ISTEP](#) project (as of 26 July 2017), [DOMICE](#) project (as of 27 July 2017) and the [EU probation project](#) (as of 26 July 2017).

¹⁰¹ CJEU Joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, *Căldăraru*, pending, para. 84.

¹⁰² CJEU Joined Cases C-404/15 *Aranyosi* and C-659/15 PPU, *Căldăraru*, pending, paras.85-104; W. van Ballegooij, P. Bárd, 'Mutual recognition and individual rights; did the Court get it right', in: *New Journal of European Criminal Law*, 4/2016, p. 439-464 at p. 450-452.

¹⁰³ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), [P8_TA\(2016\)0409](#).

another Member State and those that languish in inadequate conditions because they were not arrested abroad.¹⁰⁴ The *Aranyosi* and *Căldăraru* judgment is only the start of a discussion between the CJEU and national courts on the scope and application of the fundamental rights exception. Beyond follow up questions regarding the scope of the inquiry into detention conditions in the issuing Member States, questions will follow regarding potential violations of the right to liberty, fair trial, and even EU citizenship rights.¹⁰⁵

In December 2016, the Parliament reiterated its call for legislative intervention to address the fundamental rights and efficiency gaps in the FD EAW and mutual recognition instruments more generally.¹⁰⁶

1.2.2. Procedural rights

The Commission proposal for a FD EAW already recognised the need 'to improve the overall context' by at least partially harmonising the procedural rights of wanted persons, particularly as regards access to a lawyer and an interpreter, conditional release of the surrendered person in the executing Member State and conditions for the execution of sentences following a trial in which the suspect was not present (*in absentia*).¹⁰⁷ The European Parliament's opinion even called for legal assistance to be free of charge in cases where the requested person had insufficient means.¹⁰⁸

As regards *in absentia* decisions, Member States agreed on a framework decision in 2009, adding a specific ground for non-execution.¹⁰⁹ A 2004 Commission proposal furthermore aimed at setting common minimum standard at EU level

¹⁰⁴ W. van Ballegooij, P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in: *New Journal of European Criminal Law*, 4/2016, p. 439-464 at p. 456.

¹⁰⁵ C-496/16 (*Aranyosi*), pending; W. van Ballegooij, P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in: *New Journal of European Criminal Law*, 4/2016, p. 439-464 at p. 462.

¹⁰⁶ European Parliament resolution of 13 December 2016 [on the situation of fundamental rights in the European Union in 2015](#), P8_TA-PROV(2016)0485, para 43: 'Reiterates the recommendations to the Commission on the review of the European Arrest Warrant, notably as regards the introduction of a proportionality test and a fundamental rights exception'.

¹⁰⁷ Proposal for a Council framework decision on the European Arrest Warrant and the surrender procedures between the Member States, COM (2001) 522 final of 19 September 2001.

¹⁰⁸ European Parliament legislative resolution of 29 November 2001 on the proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, 2002 OJ (C 153E) 276 of 27 June 2002.

¹⁰⁹ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 OJ (L 81) 24 of 27 March 2009.

regarding basic fair trial rights of suspects or accused persons.¹¹⁰ This initiative however failed in Council due to cost and subsidiarity considerations.

The Commission and Member States then agreed to an alternative approach. This consisted of a 'roadmap',¹¹¹ in accordance with which the rights of suspects would be harmonised in several individual instruments. The implementation of this roadmap coincided with the entry into force of the Lisbon Treaty, providing for an explicit legal basis in Article 82 TFEU for directives setting minimum standards regarding the rights of individuals in criminal proceedings, in accordance with the ordinary legislative procedure.¹¹²

Since 2009, directives have been adopted on the rights to translation and interpretation, information, access to a lawyer and the rights to communicate upon arrest, the presumption of innocence, special safeguards for children suspected or accused of crime, and the right to legal aid. These directives also apply to wanted persons in European Arrest Warrant procedures. In addition, a recommendation on vulnerable suspects and a green paper on detention conditions were put forward.¹¹³ These measures are described in more detail below, together with indications of outstanding gaps and barriers:

Interpretation and translation

Directive 2010/64/EU provides for the right of suspects to interpretation and translation.¹¹⁴ Interpretation should be free of charge, during police interrogation, for communication with their lawyer and at trial.¹¹⁵ Documents essential for suspects to be able to exercise their right of defence must be translated.¹¹⁶ It also provides for interpretation during the surrender procedure in the executing Member State and translation of the EAW in a language that the requested person understands.¹¹⁷

Information in criminal proceedings

Directive 2012/13/EU¹¹⁸ requires that the suspect be provided promptly with information about at least:

¹¹⁰ Proposal for a Council framework decision [on certain procedural rights in criminal proceedings throughout the European Union](#), COM (2004) 328 final of 28 April 2004.

¹¹¹ Council document 14552/1/09 of 21 October 2009.

¹¹² Cf RAND (2017) chapter 1, section III (EU competence in relation to procedural rights and detention conditions).

¹¹³ *Ibid*, 9.

¹¹⁴ Directive 2010/64/EU on the Right to Interpretation and Translation (OJ L 280, 26 October 2010, p. 1-7).

¹¹⁵ *Ibid*, article 4.

¹¹⁶ *Ibid*, article 3.

¹¹⁷ *Ibid*, article 2(7).

¹¹⁸ Directive 2012/13/EU on the Right to Information in criminal proceedings (OJ L 142, 1 June 2012, p. 1-10).

- the right of access to a lawyer;
- any entitlement to legal advice free of charge and the conditions for obtaining it;
- the right to be informed of the accusation;
- the right to interpretation and translation; and
- the right to remain silent.

These rights are to be communicated either orally or in writing in simple and accessible language, taking into account any particular need of the vulnerable suspected or accused persons.¹¹⁹ Upon arrest the suspect is to be provided promptly with a 'letter of rights', which, in addition to the information mentioned above, should also contain information regarding:

- the right of access to the materials of the case;¹²⁰
- the right to have consular authorities and one person informed;
- the right of access to urgent medical assistance;
- for how many hours/days the accused may be deprived of liberty before being brought before a judicial authority.

Member States also have to ensure that any person who is arrested for the purpose of the execution of a European Arrest Warrant promptly receives an appropriate letter of rights containing information on his rights according to the national law implementing the FD EAW in the executing Member State.¹²¹

Access to a lawyer

Directive 2013/48/EU¹²² provides suspects with a right to access a lawyer before they are questioned by the police, upon the carrying out of an investigative act, without undue delay following deprivation of liberty, and where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court, whichever of those points in time is the earliest.¹²³ Should, in the course of questioning, a witness become a suspect, questioning should be suspended immediately. However, questioning may be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in the directive.¹²⁴

¹¹⁹ *Ibid*, article 3.

¹²⁰ *Ibid*, article 7.

¹²¹ *Ibid*, article 5.

¹²² Directive 2013/48/EU on the Right of Access to a Lawyer in criminal proceedings (OJ L 294, 6 November 2013, p. 1-12). For a background to the negotiations see S. Cras, 'The Directive on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings', in EUCRIM 2014/1, p. 32-44; Van Ballegooij 2015, chapter 3, section 5.2.1.4.

¹²³ Directive 2013/48/EU, article 3 (1) and (2).

¹²⁴ *Ibid*, article 2 (3), recital 21.

Suspects have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police and for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned.¹²⁵ In exceptional circumstances and only in the pre-trial phase, Member States may temporarily derogate from the right of access to lawyer, notably where there is an urgent need to avert serious adverse consequences for the life, liberty, or physical integrity of a person, and where immediate action by the investigating authorities is imperative to prevent substantially jeopardising criminal proceedings.¹²⁶

The directive also contains an article on remedies, which clarifies that in assessing statements made by the suspect or evidence obtained in breach of his right of access to a lawyer the rights of the defence and the fairness of the proceedings need to be respected.¹²⁷ The accompanying recital refers to the relevant ECtHR case law, in which it was held that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements during police interrogation without access to a lawyer are used in a conviction.¹²⁸ This leads to a situation where EU legislation offers a lower level of protection than that offered in certain Member States that have strict rules prohibiting the use of illegally obtained statements. This may lead to problems in judicial cooperation between Member States that offer a level of protection in line with the minimum requirements of the directive and those that offer a higher level of protection.¹²⁹

Member States also have to ensure that a requested person has a right of access to a lawyer in the executing Member State upon arrest pursuant to an EAW. The requested person also has a right to appoint a lawyer in the issuing Member States to provide the lawyer in the executing Member States with information and advice with a view to the effective exercise of the rights laid down in the FD EAW.¹³⁰

Transposition and implementation

It is argued that the transposition and implementation of these first 'roadmap' directives has been inadequate to date.¹³¹ The Interpretation and Translation

¹²⁵ *Ibid*, article 3 (3).

¹²⁶ *Ibid*, article 3 (6).

¹²⁷ *Ibid*, article 12.

¹²⁸ *Ibid*, recital 50; ECtHR Application no. 36391/02 of 27 November 2008, *Salduz v Turkey*.

¹²⁹ Van Ballegooij, 2015, chapter 3, section 5.2.1.4; Erbeznik, A., 'The Principle of Mutual Recognition as a Utilitarian Solution and the Way Forward', 2(1) European Criminal Law Review, 2012, p. 3-19.

¹³⁰ Directive 2013/48/EU, article 10.

¹³¹ For a more detailed discussion see RAND 2017, Chapter 3.

Directive suffers from lack of quality requirements for interpreters and a lack of systematic approaches to ascertaining the necessity of translation and interpretation. Member States also have different approaches towards determining what should be treated as 'essential documents' for translation. Furthermore, there is a lack of safeguards for the confidentiality of communication between suspects and their lawyer through an interpreter. The lack of effective remedies in a number of Member States as regards challenging a decision and complaining about the quality of interpretation and translation is also a concern.

As regards the Directive on the Right to Information in criminal proceedings, authorities tend to provide oral information to suspects in formalistic language. They also do not provide the letter of rights in a timely manner, or provide a letter which does not cover all relevant rights. They also fail to tailor the information provision to the needs of vulnerable suspects. As regards the Directive on Access to a lawyer, suspects only benefit from limited assistance from lawyers prior and during questioning due to insufficient legal aid, workload, and national procedures restraining the role of lawyers. Furthermore, national derogations to access are, in certain Member States, wider than those allowed by the directive.

The second set of Directives on the Presumption of innocence, Procedural safeguards for children and Legal aid were only published in the official journal in 2016. Therefore, at this stage, little research is available regarding their transposition and implementation. They are briefly presented below:

Presumption of innocence and the right to be present at the trial

Directive 2016/343/EU¹³² aims at guaranteeing the presumption of innocence of suspects until proven guilty under the law.¹³³ Public authorities should not make public statements that refer to a person as guilty as long as that person's guilt has not been proven according to law.¹³⁴ Neither should the suspect be present in court or in public in a manner that would suggest their guilt prior to conviction.¹³⁵ The directive also clarifies the principle that the burden of proof for establishing the guilt of suspects and accused persons should be on the prosecution. Any doubt as to guilt is to benefit the suspect.¹³⁶

¹³² Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ L 65, 11 March 2016, p. 1-11); S. Cras and A. Erbeznic, 'The Directive on the Presumption of Innocence and the Right to be Present at Trial, Genesis and Description of the New EU-Measures', *EUCRIM* 1/2016, p. 25-35.

¹³³ Directive 2016/343/EU, article 3.

¹³⁴ *Ibid*, article 4.

¹³⁵ *Ibid*, article 5.

¹³⁶ *Ibid*, article 6.

Two further important rights linked to the presumption of innocence covered by the directive are the rights to remain silent and the right not to incriminate oneself.¹³⁷ The directive also covers the right to be present at trial, and conditions in accordance with which a retrial may be demanded.¹³⁸ Its article on remedies mirrors that found in the Directive on Access to a lawyer, although the accompanying recital refers to the relevant ECtHR case law on inadmissibility of evidence gathering in violation of Article 3 ECHR (prohibition of torture, inhuman and degrading treatment and to the UN Convention against torture).¹³⁹

Procedural safeguards for children and vulnerable adults

Directive 2016/800/EU¹⁴⁰ contains procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration.

The directive specifies the information that children should receive about their rights as a suspect.¹⁴¹ These rights include that to be assisted by a lawyer;¹⁴² the right to an individual assessment;¹⁴³ the right to a medical examination;¹⁴⁴ the right to limitation of deprivation of liberty;¹⁴⁵ and to the use of alternative measures, including the right to periodic review of detention;¹⁴⁶ the right to specific treatment during deprivation of liberty;¹⁴⁷ the right to be accompanied by the holder of parental responsibility during court hearings;¹⁴⁸ and the right to appear in person at trial.¹⁴⁹

The directive offers a further degree of protection in the sense that the derogations to access to a lawyer have been limited and because Member States have to ensure that national legislation regarding legal assistance guarantees the effective exercise of the right of access to a lawyer. Nevertheless, it allows

¹³⁷ *Ibid*, article 7.

¹³⁸ *Ibid*, articles 8, 9.

¹³⁹ *Ibid*, article 10, recital 45.

¹⁴⁰ Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132, 21 May 2016, p. 1-20); S. Cras, 'The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings', *EUCRIM* 2016/2, p. 109-120.

¹⁴¹ Directive 2016/800/EU, article 4.

¹⁴² *Ibid*, article 6.

¹⁴³ *Ibid*, article 7.

¹⁴⁴ *Ibid*, article 8.

¹⁴⁵ *Ibid*, article 10.

¹⁴⁶ *Ibid*, article 11.

¹⁴⁷ *Ibid*, article 12.

¹⁴⁸ *Ibid*, article 15.

¹⁴⁹ *Ibid*, article 16.

Member States to derogate from provisions on the access to a lawyer in case the access is not proportionate according to the circumstances of the case.¹⁵⁰

Where detention is imposed, Member States have to ensure that detained children are held separately from adults, unless it is considered to be in the child's best interests not to do so.¹⁵¹ Member States must ensure and preserve children's health, mental and physical development, as well as, amongst other things their right to education and training.¹⁵² The Commission decided that, given the differences in approach among the Member States, proposing a directive on the procedural rights of other vulnerable suspects, due to age, mental or physical conditions or disabilities, was not possible. Instead, it issued a recommendation seeking to encourage Member States to strengthen certain procedural rights of vulnerable suspects or accused persons.¹⁵³

Legal aid

In November 2013, the European Commission submitted a proposal for a directive on provisional legal aid for suspects or accused persons and legal aid in European warrant proceedings.¹⁵⁴ The European Parliament however proposed to broaden the scope of the draft directive beyond the framework proposed by the Commission to include the right to ordinary legal aid for suspects or accused persons. An ex-ante impact assessment of the substantial amendments proposed by Parliament was conducted. The study concluded that the amendments proposed by the Parliament would have a positive impact on the fundamental rights of suspects or accused persons, even though they would imply certain additional administrative costs for Member States.¹⁵⁵

During its negotiations with the Council, the Parliament managed to obtain a broader scope of application in the subsequent Directive 2016/1919 on Legal

¹⁵⁰ W. van Ballegooij, 'Wederzijdse erkenning en minimumstandaarden in het strafprocesrecht: wat is de meerwaarde van EU-regelgeving op dit terrein?', in P. Verrest and S. Struijk (Eds.), *De invloed van de Europese Unie op het strafrecht*, Landelijke Strafrechtsdag 2016, Boom Juridisch, Den Haag, 2016, p. 85-92.

¹⁵¹ Directive 2016/800/EU, article 12(1).

¹⁵² Directive 2016/800/EU, article 12(4).

¹⁵³ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, OJ C 378, 24 December 2013, p. 8-10.

¹⁵⁴ Proposal for a directive of the European Parliament and of the Council [on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings](#), COM (2013) 824 final of 27 November 2013.

¹⁵⁵ [Impact assessment of substantial amendments to a Commission proposal, Provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings](#) Milieu Ltd. for the Ex-Ante Impact Assessment Unit, EPRS, European Parliament, 2016, PE 581.410.

Aid¹⁵⁶. The directive applies when suspects are deprived of liberty, when suspects are required by law to be assisted by a lawyer, and when they are required or permitted to attend certain investigative or evidence-gathering acts.¹⁵⁷ The directive also provides clear guidance on criteria to apply when conducting a means test and/or a merits test to determine whether a person is eligible for legal aid.¹⁵⁸ It also covers legal aid in European Arrest Warrant proceedings, both in the issuing and executing Member State.¹⁵⁹ The directive furthermore contains provisions related to the quality of legal aid and professional training of staff involved in the decision-making, and of lawyers providing legal aid services.¹⁶⁰

Pre-trial detention

A particular gap in protection, identified in academic research and NGO reports,¹⁶¹ concerns pre-trial detention, which in practice is not always imposed as a measure of last resort, and is disproportionately imposed on foreign suspects within the EU, due to a presumed risk of flight. According to Eurostat, in 2014 over 20 % of the total prison population within the EU was made up of pre-trial detainees.¹⁶² The 2011 green paper on detention conditions¹⁶³ underlined the great variation in the length of PTD between Member States, which can harm judicial cooperation and undermine fundamental rights. It raised the question whether EU legislation on the matter, covering maximum PTD periods and the regular review of such detention, could be envisaged. In its response to the green paper, the European Parliament explicitly called for EU legislation setting minimum standards on PTD.¹⁶⁴ It repeated this call in its resolutions on reform of the EAW¹⁶⁵ and fundamental rights in the European Union.¹⁶⁶ However, among Member States the appetite for binding measures has not been high to date. The Commission has therefore concentrated its efforts on the proper implementation

¹⁵⁶ Directive 2016/1919 (OJ L 297, 4 November 2016, p. 1); S.Cras, 'The Directive on the Right to Legal Aid in Criminal and EAW Proceedings, Genesis and Description of the Sixth Instrument of the 2009 Roadmap', EUCRIM 1/2017, p. 34-45.

¹⁵⁷ Directive 2016/1919/EU, article 2 (1).

¹⁵⁸ *Ibid*, article 4.

¹⁵⁹ *Ibid*, article 5.

¹⁶⁰ *Ibid*, article 5.

¹⁶¹ Fair Trials International, [A Measure of Last Resort? The practice of pre-trial decision making in the EU](#), 2016.

¹⁶² Eurostat, [Prisoners by legal status of the trial process](#); *Prison conditions in the Member States: selected European standards and best practices*, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, PE 583.113, 2017.

¹⁶³ COM (2011) 327 final of 14 June 2011.

¹⁶⁴ European Parliament resolution of 15 December 2011 on detention conditions in the EU, [P7_TA\(2011\)0585](#), paragraph 10.

¹⁶⁵ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), [P7_TA\(2014\)0174](#), paragraph 17.

¹⁶⁶ European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, [P8_TA-PROV\(2016\)0485](#), paragraph 43.

of the FD on Transfer of Prisoners, FD PAS, and FD ESO¹⁶⁷ and the adoption of the other roadmap measures.¹⁶⁸

Fulfilling the promise to EU citizens?

The directives on the rights of suspects in criminal proceedings refer to the concept of EU citizenship in their recitals, promising that approximation of criminal procedures should remove obstacles to the free movement of citizens throughout the territory of the Member States. More generally, a 2014 Commission communication on an EU justice agenda called for justice and citizens' rights to have no borders by 2020.¹⁶⁹ The Treaty however limits approximation of criminal procedure to the extent necessary to facilitate smooth law enforcement cooperation, rather than to enhance the rights of EU citizens. Additionally, approximation has to take account of the differences between the legal traditions and systems of the Member States.¹⁷⁰ In practice, this has meant that instead of removing obstacles to free movement, the suspects' rights directives have focused on codifying European Court of Human Rights (ECtHR) jurisprudence, notably on the right to a fair trial.

Member States' standards continue to vary and in some cases go beyond these minimum norms at various points. National courts have sought to uphold protections offered by national criminal law, which go beyond the minimum level established in EU legislation. As discussed above, the Court of Justice however insists on the recognition of judicial decisions that comply with the minimum safeguards laid down in ECtHR jurisprudence.¹⁷¹ This means that certain individual rights protections that apply domestically do not apply in cross-border situations.¹⁷²

This state of affairs contravenes the promises of 'free movement without facing obstacles' made by the suspects' rights directives and the idea that 'a person should not lose the protection that he enjoys through exercising his free

¹⁶⁷ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, [COM \(2014\) 057 final](#) of 5 February 2014.

¹⁶⁸ J. Bener, 'Detentie in de Europese Unie', in: P. Verrest and S. Struijk, *De invloed van de Europese Unie op het strafrecht*, Landelijke Strafrechtsdag 2016, Boom Juridisch, Den Haag, 2016, pp. 35-44.

¹⁶⁹ [The EU justice agenda for 2020 – Strengthening trust, mobility and growth within the Union](#), COM (2014) 144 final of 11 March 2014, p. 10.

¹⁷⁰ Article 82 (2) TFEU.

¹⁷¹ CJEU case C-399/11, *Melloni* [2013] 107.

¹⁷² Cf. W. van Ballegooij, P. Bárd, 'Mutual recognition and individual rights; did the Court get it right?', in: *New Journal of European Criminal Law*, 4/2016, p. 439-464

movement rights'.¹⁷³ In a way, one might say the Union has created expectations that, in the current stage of development of the Area of Freedom, Security and Justice, it has not kept. In the criminal justice area, 'internal frontiers' are still very much present.

¹⁷³ Opinion of A. G. Sharpston delivered on 6 February 2014 in Case C-398/12, *Procura della Repubblica v M.*, para. 45: 'A person should not lose the protection that he enjoys under national criminal law through exercising his free movement rights (...)'.

2. Impact of the current gaps and barriers in EU cooperation and action

Key findings

- Individuals may suffer inappropriate treatment at all stages of the criminal proceedings. This could lead to increased legal costs, detrimental effects on employment, education, private, and family life, as well as immaterial impacts on the individual's mental and psychological health. Detention may expose the individual to maltreatment and violence, with a particular impact on vulnerable groups.
- Pre-trial detention has an economic cost of approximately €1.6 billion per year for EU Member States. Depending on the estimation method, this amount could be reduced by either €162 or €707 million per year spent on 'excessive' pre-trial detention.
- Overcrowded prisons have a detrimental effect on the physical and mental health of prisoners, as well as increasing suicide rates. It also undermines their rehabilitation prospects, including attempts to prevent radicalisation in the fight against terrorism.

As discussed in chapter 1, a lack of respect for procedural rights and inhuman detention conditions cannot be properly addressed without full respect for democracy and the rule of law. The lack of respect also has economic consequences, for it is a breeding ground for corruption and disincentives potential economic investors.¹⁷⁴ Member States' lack of compliance with international and EU rights and values also have a direct effect on the effective functioning of EU measures and cooperation, including the mutual recognition of judicial decisions in criminal matters, as they are based on the presumption of compliance with these obligations.¹⁷⁵ In the following sections, the impacts resulting from the gaps and barriers to European cooperation and action in the area of procedural rights and detention conditions are presented both in terms of impacts on individuals and economic impacts on Member States.

¹⁷⁴W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), DG EPRS, European Parliament, October 2016, PE 579.328, chapter 3; [Annex II, CEPS, Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights](#), Annex IV.

¹⁷⁵ Communication from the Commission to the European Parliament and the Council, [A new EU framework to strengthen the rule of law](#), COM (2014) 158 final of 19 March 2014, p. 2.

1.1. Impacts on individuals

The gaps identified in the mutual recognition instruments may have various negative consequences for individuals, ranging from a deterioration in prison conditions or even exposure to inhuman or degrading treatment due to transfer in accordance with the FD Transfer of Prisoners or execution of an EAW. Loss of liberty, employment, and other consequences could result from exposure to disproportionate EAWs. Individuals may suffer lower reintegration prospects in cases of transfer to serve a sentence in the country of origin instead of the country with the closest ties. Loss of liberty, or employment might result from pre-trial detention, which could be avoided by the use of the European Supervision Order. Loss of liberty could also be avoided by executing provisional or alternative sentences in accordance with the FD PAS.¹⁷⁶

As regards suspects' rights, it should be pointed out that individuals may suffer inappropriate treatment at all stages of the criminal proceedings (questioning, prosecution, and sentencing). Where rights are not respected, people might be charged or prosecuted with an offence when, by law, they should not have been. Such suspects are unable to mount a proper defence in circumstances where they cannot understand proceedings. They may incur personal costs in hiring a lawyer and other services, which by law, should be provided by the state. It is plausible that this could have knock-on effects on individuals' employment, education, private and family life, as well as immaterial impacts on their mental and psychological health.

As regards the roadmap directives in particular, gaps in EU legislation could result in situations where suspects are completely denied a right because, for example, the scope of the directives does not cover their situation – such as vulnerable suspects who are not covered by binding EU legislation. Extensive grounds for refusal, derogation or limits to rights also deprive individuals of the ability to effectively exercise their rights in practice. The same is true for national transposition and implementation, which does not comply with the wording and/or spirit of EU legislation.¹⁷⁷ A qualitative assessment of the impacts of the gaps and barriers identified in the roadmap measures is provided below. It distinguishes between issues leading to a de facto denial or erosion of a right

¹⁷⁶ Cf. RAND 2017, Chapter 5, section II.

¹⁷⁷ Cf. RAND 2017, Chapter 5, section III.

Table 1: Qualitative assessment of the gaps identified in the roadmap measures

Roadmap measure	Gap identified	Possible scenario of most likely possible impact	Impact in terms of protecting fundamental rights and freedoms
Interpretation and translation	Lack of systematic approaches to ascertain the necessity of translation/ interpretation.	Might result in denial of interpretation/ translation to individuals who need it.	De facto denial
Interpretation and translation	Different approach to essential documents for translation	Might result in crucial documents not being provided in written translation.	De facto denial
Right to information	Letters of rights do not always cover all the rights prescribed by the directive or are not provided in a timely manner.	Might result in information about some rights not being provided at all, and/or information about rights not being provided at important stages of the criminal justice process.	De facto denial
Right to information	The information is provided in formalistic language, not tailored to needs of vulnerable suspects.	Might result in information about rights being provided, but not all of it is clear.	De facto erosion
Right of access to a lawyer	Limited assistance prior and during questioning due to insufficient legal aid, workload and national procedures limiting the role of lawyers	Might affect the effective exercise of defence rights.	De facto erosion
Right of access to a lawyer	National derogations to access are in certain MS wider than those allowed by the directive.	Might affect the effective exercise of defence rights.	De facto denial

Source: RAND 2017 (slightly adapted and limited to issues highlighted in this cost of non-Europe report)

Pre-trial detention leads to a loss of freedom. It also imposes direct economic costs in terms of lost working days, as well as indirect costs in terms of reputational damage, or missed educational opportunities. Using data from Eurostat on net labour earning and the average employment rate, (approximately 37% of those detained) provided by a 2016 study,¹⁷⁸ it is estimated that the average monthly earning loss varies between €62 and €713 per detainee and month, depending on the country.

Table 2: Average earning loss/detainee

Country	Per month	Per day	Country	Per month	Per day
Austria	€519.49	€17.32	Italy	€392.73	€13.09
Belgium	€540.76	€18.03	Latvia	€111.90	€3.73
Bulgaria	€62.60	€2.09	Lithuania	€105.59	€3.52
Croatia	€147.9	€4.93	Luxembourg	€713.12	€23.77
Cyprus	€434.66	€14.49	Malta	€290.80	€9.69
Czech Republic	€151.11	€5.04	Netherlands	€623.69	€20.79
Denmark	€544.32	€18.14	Poland	€122.68	€4.09
Estonia	€161.56	€5.39	Portugal	€243.59	€8.12
Finland	€546.35	€18.21	Romania	€75.15	€2.50
France	€472.24	€15.74	Slovakia	€137.64	€4.59
Germany	€497.43	€16.58	Slovenia	€217.42	€7.25
Greece	€270.03	€9.00	Spain	€362.17	€12.07
Hungary	€100.37	€3.35	Sweden	€566.78	€18.89
Ireland	€517.37	€17.25	United Kingdom	€587.73	€19.59

Source: RAND 2017

Detainees also lose their ability to fulfil family responsibilities. This includes no longer being able to take care of children and other family relatives. In the case of children, this may have a wider impact on their development. Pre-trial detention may furthermore expose the individual to maltreatment and violence, which has a particular impact on vulnerable groups.¹⁷⁹

As regards detention conditions, the assessment conducted by RAND reported that the ECtHR has found violations in relation to approximately half of sections of the European Prison Rules, discussed in section 1.1., notably:

- A lack of respect for the basic principles expressed in the EPR;
- Failures in relation to many aspects of the conditions of imprisonment;
- Lack of particular protection for children in detention;
- Lack of provision for physical health assistance;

¹⁷⁸ Cf. RAND 2017, Appendix D.

¹⁷⁹ Cf. RAND 2017, Chapter 5, section IV.

- Lack of protection for the safety of detainees;
- Inappropriate staff behaviour.¹⁸⁰

Overcrowding in particular has an impact on the physical and mental health of the individual, including through violence. It also has a negative impact on rehabilitation, including anti-radicalisation efforts. As the CoE white paper on prison overcrowding states:

'It has to be taken into account that prisons are places where some people may be feeling vulnerable, some of them in search of their identity and in need of protection, which is a fertile ground for organised gangs and radicalised prisoners to find followers and influence minds. Management and staff are often powerless in overcrowded prisons against such influences, due to a lack of resources to ensure space, time and attention to individual work with prisoners and proper preparation for release and reintegration.¹⁸¹

Levels of overcrowding in European prisons are statistically significantly associated with higher levels of suicide in European prisons.¹⁸²

1.2. Economic impacts on Member States

Keeping individuals in pre-trial detention is costly.¹⁸³ One day in PTD per detainee costs on average about €115, with significant cost variation across Member States.¹⁸⁴ In 2016, more than 100 000 people were held in PTD in the EU. The total cost of PTD, including the cost to the public related to running pre-trial facilities (including prisons) and compensation paid to individuals acquitted, as well as individual costs related to average income and property loss is about €1.6 billion.

There is no robust quantitative evidence as to the level of PTD that is excessive, but to explore the possible impact of reducing excessive PTD, the research team looked at two scenarios:

¹⁸⁰ RAND 2017, Chapter 5, section V.

¹⁸¹ European Committee on Crime Problems, [white paper on prison overcrowding](#), Council of Europe, 30 June 2016, paragraph 39.

¹⁸² RAND 2017, Appendix F.

¹⁸³ European Commission, accompanying document to the proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union, (COM (2006) 468 final of 29 August 2006), impact assessment summary SEC(2006)1080.

¹⁸⁴ Cf. RAND 2017, Chapter 5, section IV.

Scenario 1: Reduction of average length of time spent in detention and level of individuals in PTD at any given point in time to the EU average.

Scenario 2: The number of individuals held in PTD is reduced in each Member State by the average proportion of people on trial who are acquitted in a given country.

The findings of this estimation showed that if all countries reduced the average length of PTD to the EU average (in length and scale), that would reduce to overall costs by about €707 million. If all countries reduced the current scale of PTD by their average estimated rate of acquittal, we estimate that this could reduce the cost by about €162 million.

Table 3: Total cost of PTD across EU Member States under different scenarios

Member State	Number of pre-trial detainees	Average number of PTD days	Total cost (million)	SC1 (above average to average)	SC2 (rate of acquittal)
Austria	1 848	68	€17.6	€17.6	€13.3
Belgium	3 314	80	€42.3	€40.0	€38.5
Bulgaria	690	165	€7.3	€7.3	€7.1
Croatia	719	165	€2.0	€1.9	€1.6
Cyprus	97	165	€0.7	€0.7	€0.7
Czech Republic	2 185	150	€17.0	€17.0	€16.0
Denmark	930	55	€11.1	€10.4	€9.7
Estonia	605	120	€3.3	€3.3	€3.3
Finland	640	120	€15.0	€14.9	€14.8
France	17 030	116	€216.1	€203.8	€208.5
Germany	13 713	120	€245.2	€242.1	€222.9
Greece	2 557	365	€37.2	€19.1	€33.9
Hungary	4 400	364	€49.4	€25.8	€47.7
Ireland	575	60	€7.3	€7.3	€6.3
Italy	17 169	180	€489.3	€35.7	€444.8
Latvia	1 376	365	€13.5	€6.6	€13.3
Lithuania	942	120	€2.6	€2.6	€2.5
Luxembourg	283	150	€9.9	€7.7	€9.0
Malta	89	165	€0.6	€0.6	€0.5
Netherlands	4 215	120	€140.9	€109.3	€124.8
Poland	500	165	€2.4	€2.4	€2.2
Portugal	2 330	365	€47.1	€25.8	€36.5
Romania	2 588	270	€16.1	€6.2	€15.7
Slovakia	1 363	213	€13.2	€3.0	€12.5
Slovenia	231	120	€1.9	€1.9	€1.8
Spain	8 636	180	€120.0	€10.0	€99.9
Sweden	1 542	30	€19.9	€18.6	€18.1
United Kingdom	10 724	60	€98.6	€98.6	€79.7
Total			€1 647.6	€940.6	€1 485.8
Savings				€707.2	€161.8

Source: RAND 2017, Chapter 5, section IV

3. Options for action and cooperation at EU level that could address the gaps and barriers

Key findings

- Excluding mutual recognition of judicial decisions from scrutiny by the ECtHR during negotiations on EU accession to the ECHR would diminish the latter's added value. The EU could further strengthen the UN and CoE monitoring bodies as well as help ensuring the enforcement of ECtHR decisions within the Union.

- An EU mechanism for democracy, the rule of law and fundamental rights would provide a systematic, regular overview of procedural rights and detention conditions in the Union and allow for a timely EU response to systemic problems in Member States. To ensure added value, synergies with UN and CoE efforts would need to be achieved.

- Proper implementation of EU legislation could be achieved through handbooks, guidelines, databases and training. The Commission should make use of its power to launch infringement procedures against Member States where necessary. This requires the allocation of adequate human and financial resources at EU and Member States level.

- The Framework Decisions on the European Arrest Warrant and Transfer of Prisoners should be amended to include a proportionality check, inter alia ensuring that an EAW is only issued as a last resort in view of less intrusive alternatives, and fundamental rights exceptions. This would decrease the current efficiency and fundamental rights gaps, as well as time spent by suspects in surrender and subsequently pre-trial detention. Both framework decisions should also incorporate language to force judicial authorities to consider social rehabilitation prospects and enable them to verify detention conditions.

- The gaps identified in the roadmap measures can be addressed by targeted amendments following the last transposition deadline of the Roadmap Directives expires in mid-2019. There is sufficient evidence supporting the added value of an EU directive on pre-trial detention, covering procedural requirements as well as substantive criteria to be taken into account for the decision to impose pre-trial detention.

Generally, these measures would lead to better compliance with EU values and rights, meeting the expectations of EU citizens in the EU criminal justice area, increasing trust between judicial authorities, and cost savings for Member States.

Options for action at EU level that could address the gaps and barriers identified in EU cooperation and action in the area of procedural rights and detention conditions include:

1. Ensuring better compliance with international obligations. EU accession to the ECHR, in line with the obligation to do so in accordance with Article 6 (2) TEU, would help to ensure a degree of coherence in the interpretation of fundamental rights at EU and CoE level. EU accession would imply that the EU could be called to appear before the ECtHR as a co-defendant. For instance in cases where the EU principle of mutual recognition, based on trust in fundamental rights protection in the other Member State, is tested against ECHR standards. The CJEU has expressed concerns regarding the prospect of the ECtHR imposing an obligation on Member State to mutually checking observance of ECHR rights. However, excluding mutual recognition of judicial decisions from ECtHR jurisdiction would diminish its added value.¹⁸⁵ Another benefit of EU accession to the ECHR would be that an additional level of scrutiny would be added by directly participating in the monitoring of the execution of ECtHR decisions.

Furthermore, the Commission should continue supporting the external monitoring bodies and data collection efforts, as it has done in the past, by funding an EU network of independent prison monitoring bodies as well as the collection and analysis of prison statistics.¹⁸⁶ In its resolution on prison systems and conditions, the European Parliament reiterated the need for the EU and its Member States to ensure compliance with international obligations and recommendations, notably from the UN and CoE.¹⁸⁷

2. Ensuring compliance with democracy, the rule of law and fundamental rights within the EU. This could be achieved through an EU pact for democracy, the rule of law and fundamental rights (DRF), in the form of an interinstitutional agreement (IIA) based on Article 295 TFEU, as the European Parliament called for in 2016.¹⁸⁸ The IIA should lay down arrangements for the development of an annual European report on the state of DRF in the Member States. This could be

¹⁸⁵ Cf. RAND 2017, Chapter 6, section I.

¹⁸⁶ Cf. R. Manko, [How the EU budget is spent, Justice programme \(2014-2020\)](#), EPRS, European Parliament, 2017.

¹⁸⁷ European Parliament resolution of 5 October 2017 on prison systems and conditions, [P8_TA-PROV\(2017\)0385](#).

¹⁸⁸ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), [P8_TA\(2016\)0409](#).

a basis for discussion between the EU institutions and national parliaments, resulting in country-specific recommendations aimed at monitoring and enforcing Member State compliance.

The added value of action at EU level is that responsibility for DRF monitoring and evaluation exercises could be clearly allocated and coordination would be ensured. Swifter and more effective cooperation among EU institutions and between those institutions and Member States could be achieved throughout DRF enforcement. The proportionality of EU intervention should be guaranteed through a methodology for the European report on the state of democracy, the rule of law and fundamental rights in the Member States, which is not unduly burdensome and costly in terms of data collection and reporting requests to Member States.

The annual European report could build on the development of a European Fundamental Rights Information System (EFRIS) by the Fundamental Rights Agency, based on existing sources of information and evaluations of instruments, taking into account the specificity of the EU and its mutual recognition regime. Member States' compliance with UN and CoE instruments and the implementation of ECtHR judgments related to procedural rights and detention conditions could be assessed in this context.¹⁸⁹

Developing an annual European report and policy cycle on the state of DRF in the Member States could be done at relatively low cost, particularly if the right synergies are found with international organisations, whilst at the same time having significant benefits, notably fostering mutual trust and recognition, attracting more investment, and providing higher welfare standards.¹⁹⁰

3. Ensuring proper transposition and implementation of EU legislation such as in the areas of transfer of prisoners, alternatives to detention (both pre and post-trial) and suspects' rights should be a priority for the EU and its Member States.¹⁹¹ Correct transposition and implementation can be further facilitated through:

- the drawing up of implementation handbooks, like those on the EAW, FD Transfer of Prisoners and FD PAS;
- guidelines;

¹⁸⁹ W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, October 2016.

¹⁹⁰ W. van Ballegooij, T. Evas, [An EU mechanism on democracy, the rule of law and fundamental rights](#), EPRS, European Parliament, October 2016.

¹⁹¹ European Parliament resolution of 26 October 2017 on monitoring the application of EU law 2015, [P8_TA\(2017\)0421](#)

- repositories of relevant information, such as the e-justice portal;¹⁹²
- training through the European Judicial Training Network,¹⁹³ as well as
- support for specific judicial training initiatives and projects to enhance suspects' rights through the EU justice programme.¹⁹⁴

The application of Union instruments in the field of criminal justice are dependent upon the effective functioning of national criminal justice systems.¹⁹⁵ This includes proper funding and training of practitioners, as highlighted by the 2016 CoE Commission for the Efficiency of Justice (CEPEJ) report. This report considers that on the whole CoE states have not made sufficient efforts towards allocating more budgetary resources for judicial training and in a number of states, legal aid budgets were restricted.¹⁹⁶

The Commission also needs to make full use of its enforcement powers, including the possibility to launch infringement procedures if a Member State breaches its obligations. As this is a complex area, regulated by a large number of interrelated legal instruments, and the Commission will have to allocate substantial human and financial resources towards fulfilling its enforcement role.

4. Reviewing existing EU legislation to ensure better fundamental rights compliance, for instance as regards the operation of the European Arrest Warrant.¹⁹⁷ As discussed in section 1.2.1., in a 2014 resolution based on a legislative initiative report,¹⁹⁸ the European Parliament called on the Commission to propose a proportionality check, a standardised consultation procedure and a fundamental rights refusal ground in the FD EAW or mutual recognition instruments more generally through a separate legal instrument based on Article 82(1)(d) TFEU.

The accompanying European added value assessment (EAVA)¹⁹⁹ estimated that the enforcement costs of non-executed European Arrest Warrants was around

¹⁹² [European e-Justice Portal](#).

¹⁹³ Cf. R. Manko, [How the EU budget is spent, Justice programme \(2014-2020\)](#), EPRS, European Parliament, 2017.

¹⁹⁴ Justice programme; http://ec.europa.eu/justice/grants1/programmes-2014-2020/justice/index_en.htm.

¹⁹⁵ European Parliament resolution of 12 March 2014 on evaluation of justice in relation to criminal justice and the rule of law, [P7_TA\(2014\)0231](#), recital O.

¹⁹⁶ [European Judicial Systems, Efficiency and Quality of Justice](#), CEPEJ studies nr. 23, Council of Europe, 2016.

¹⁹⁷ European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015, para. 43.

¹⁹⁸ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).

¹⁹⁹ M. del Monte, [Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's legislative own-initiative report \(Baroness](#)

€215 million for the period between 2005 and 2009,²⁰⁰ meaning approximately €43 million per year. The socioeconomic and fundamental impacts on individuals should also be taken into account. Costs of (pre-trial) detention are closely linked to the practical implementation of the European Arrest Warrant. Owing to the perceived flight risk, non-resident suspects are often kept in detention, while residents benefit from alternative measures. The impact assessment accompanying the Commission proposal for a directive on legal aid for suspected and accused persons in criminal proceedings (now adopted),²⁰¹ estimated that a month of pre-trial detention approximately costs €3 000. The measures called for by the EP are expected to lead to cost savings for the Member States and more mutual trust between judicial authorities based on respect for fundamental rights. Preventing the disproportionate use of the EAW would also reduce pre-trial detention.

As regards the Transfer of Prisoners FD, a motivational duty for the issuing Member State could be introduced, which would oblige relevant authorities to determine the following on the transfer certificate:

1. social rehabilitation prospects of the individual;
2. assurances of no aggravation of the person's situation in the executing state; and
3. assurances of adequate detention conditions in the executing state.

Such an explicit assurance could also keep up the pressure on the Member States to comply with international detention standards.

Furthermore, minimum rules for obtaining consent of the individual to be transferred and an explicit legal remedy against the decision to execute or not to execute a transfer request could be introduced.

The Commission could also propose targeted amendments to the suspects' rights directives to fill gaps, provide more clarity and incorporate the interpretation of certain provisions by the CJEU. Examples include adding a right for suspects to request another interpreter, and tightening the derogations to the right of access to a lawyer.²⁰² It is recognised however that such targeted amendments should

[Sarah Ludford](#)), 2014; Annex I: A. Weyembergh with the assistance of I. Armada and C. Brière, [Critical assessment of the existing European Arrest Warrant framework decision](#); Annex II: A. Doobay, [Assessing the need for intervention at EU level to revise the European Arrest Warrant Framework Decision](#).

²⁰⁰ For the latest information on the number of EAWs issued and executed, see the [European Judicial Network](#).

²⁰¹ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297/1 of 4 November 2016.

²⁰² More suggestions are made by RAND 2017, chapter 6 section IV.

probably not be considered before the end of 2019, when the transposition deadline of the roadmap directives has expired and more evidence on the transposition, implementation and interpretation of the other directives is available.

5. Enacting additional EU legislation and take common action in the area of suspects' rights and detention conditions

A number of suspects' rights are currently not been subject to EU legislation. In this context, ideas have been put forward for areas that the EU could include in a second roadmap to approximate the rights of suspects in criminal proceedings based on Article 82 (2) (b) TFEU.²⁰³

The pre-conditions for and procedural rights related to PTD, as well as the further promotion of alternatives to pre-trial detention, are often mentioned. An EU directive on PTD could cover procedural requirements as well as substantive criteria to be taken into account for the decision to impose pre-trial detention. This means not only relying on the seriousness of the alleged offence but also making an individual assessment of the flight risk and risk of re-offending. The directive could also require appropriate reasons not only for imposing pre-trial detention but also for not resorting to alternatives.

The competence for adopting binding EU legislation on post-trial detention conditions on the basis of Article 82 (2)(b) has been contested during the negotiations on the child suspects directive. However, the *Aranyosi* and *Căldăraru* case has highlighted that in practice inadequate detention conditions may constitute an obstacle to Member State compliance with mutual recognition instruments, such as the FD EAW and the FD Transfer of Prisoners.

²⁰³ European Criminal Bar Association, Agenda 2020: [A new roadmap on minimum standards of certain procedural safeguards](#), draft of 15 April 2017.

4. Recommendations

Significant benefits could be achieved by the EU and its Member States addressing the gaps and barriers in the protection of suspects' rights and the rights of detainees, both pre and post-trial, notably:

- better compliance with EU values and rights would meet EU citizens expectations in the criminal justice area;
- increased mutual trust between judicial authorities based on respect for fundamental rights; and cost savings for the Member States.

All these benefits could be achieved by ensuring better compliance with international obligations, chiefly through EU accession to the ECHR; ensuring compliance with democracy, the rule of law and fundamental rights within the Union; ensuring proper implementation of EU legislation; reviewing existing EU legislation to ensure better fundamental rights compliance and enacting new EU legislation; as well as taking further common action. Although EU competence to adopt legislation on detention conditions post-trial is contested, judicial cooperation measures, especially those relating to the transfer of wanted persons at EU level are indispensable.

Annex I

Research Paper on the Costs of Non-Europe in the Area of Procedural Rights and Detention Conditions

**Research paper
by RAND Europe**

Abstract

People who are suspected or accused of criminal offences or who are held in prison are in a vulnerable position and face many possible threats to their fundamental rights. The aim of this Research Paper is to establish the Cost of Non-Europe in the Area of Procedural Rights and Detention Conditions.

The study has three areas of focus: procedural rights of suspects and accused persons in relation to mutual recognition instruments (the European Arrest Warrant, European Investigation Order, European Supervision Order, the Framework Decision on the Transfer of Prisoners, Framework Decision on the recognition of Probation Measures and Alternative Sanctions); the rights of suspects and accused persons included in the 2009 “Roadmap”; and detention conditions.

Based on a review of literature and stakeholder interviews, this study identifies a number of gaps in relation to the implementation and effectiveness of existing EU measures aiming to protect procedural rights. It also highlights the imposition and use of pretrial detention and the conditions of detention (pre and post-trial) as areas where there are currently no specific EU measures, but where there is evidence that practice in Member States poses threats to fundamental rights.

The study identifies the potential cost that could be saved to individuals and Member States through reductions in the use of detention, and makes extensive suggestions for legislative and non-legislative measures to address the identified gaps and barriers.

AUTHORS

This study has been written by researchers from RAND Europe, a not-for-profit research organisation that helps to improve policy and decision-making through research and analysis, at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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Abbreviations

EAW	European Arrest Warrant
EIO	European Investigation Order
ESO	European Supervision Order
EU	European Union
EULITA	European Legal Interpreters and Translators Association
FD	Framework Decision
FRA	Fundamental Rights Agency
GRECO	The Group of States against Corruption
HRC	United Nations Human Rights Committee
IA	Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
LEAP	Legal Experts Advisory Panel
LIBE Committee	Civil Liberties, Justice and Home Affairs Committee
LoR	Letter of Rights
MONEYVAL	Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
NPMs	National Preventative Mechanisms
NGO	Non-governmental organisation
OPCAT	Optional Protocol to the UN Convention Against Torture
PAS	Probation Measures and Alternative Sanctions
PCF	Programmatic Cooperation Framework
PTD	Pretrial detention
PRO-JUS	Procedural Rights of Juveniles Suspected or Accused in the EU
RAN	Radicalisation Awareness Network
SIS	Schengen Information System
SPT	United Nations Subcommittee on Prevention of Torture
SWP	Staff Working Paper
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TOP	Transfer of Prisoners
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UPR	United Nations Universal Period Review

Executive summary

The protection of people who are suspected or accused of criminal offences and of individuals held in prison is a cornerstone of European and international human rights principles and law. Rights to liberty, protection from inhumane and degrading treatment, protections for privacy and family life – among others – all need to be respected when a person is involved in the criminal justice system. The protection of procedural rights and conditions of imprisonment are inextricably linked to the European Union's (EU) fundamental values and the creation of an Area of Freedom, Security and Justice (AFSJ).

This report looks at the cost of non-Europe in relation to procedural rights and detention conditions. Cost of non-Europe reports are intended to study opportunities for gains or the realisation of a public good through common action at the EU level. These reports attempt to identify areas that might have expected benefits from deeper EU integration or coordination. This study into the cost of non-Europe in relation to procedural rights and detention conditions aims to answer the following questions:

1. What is the current state of play and the corresponding gaps and barriers in European cooperation and action in the area of procedural rights and detention conditions?
2. What is the impact of these current gaps and barriers – in terms of the economic impacts and impact at individual level in terms of protecting their fundamental rights and freedoms?
3. Are there potential options for action at EU level that could address these gaps and barriers and what are their potential costs and benefits?

Central to the objectives of this report is understanding whether (and how) existing EU action adds value by enhancing protection for rights and where (and how) further EU action could add further value, in line with principles of subsidiarity and proportionality.

The following procedural rights issues are the focus of this study:

Procedural rights of suspects and accused persons in relation to the five key Mutual Recognition Instruments: the European Arrest Warrant (EAW); the European Investigation Order (EIO); the European Supervision Order (ESO); the Framework Decision on the Transfer of Prisoners (TOP); and the Framework Decision on the Supervision of Probation Measures and Alternative Sanctions (PAS).

Rights of suspects and accused persons in criminal proceedings – in particular, the rights included in the 2009 Roadmap, including pretrial detention (PTD) as well as those that are now subject to a Directive.

Detention conditions – both pre- and post-trial.

The methods used to produce this paper included an analysis of the relevant mutual recognition instruments and directives, a review of the literature (including academic papers, material published by the European institutions, publications from organisations such as the Fundamental Rights Agency (FRA) and Council of Europe (CoE) and non-governmental

organisations such as Fair Trials); interviews with 10 expert stakeholders; and an analysis of available data and statistics as well as economic modelling based on these data.

One challenge in conducting this study was that there is little systematic, pan-European data about the extent to which procedural rights of suspects and accused persons are respected on a day-to-day basis. Decisions of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) provide insight into particular cases, but there is no information available (for example, from a pan-European survey of defence lawyers or civil society organisations) that allows us to empirically estimate the frequency and severity of procedural rights infringements. This means that quantitative assessments of impacts (research question 2) are only possible for some aspects of the gaps identified. The methods and limitations for the study are described in Chapter 1.

EU competence

An important starting point for all Cost of Non-Europe studies is to understand the competence the EU has to act in a particular area. This is not a straight-forward issue, and arguments are presented in detail in Chapter 1. Key points are as follows:

The EU has an express legal basis to adopt minimum standards in criminal proceedings in Article 82(2) of the Treaty on the Functioning of the European Union (TFEU).

Article 82(1) TFEU emphasises that the basis of judicial cooperation is mutual recognition. This is the starting point for the EU's competence under Article 82(2) TFEU, both in terms of justification and as limitation of approximation (to the extent necessary to facilitate mutual recognition). One of the underlying general objectives of Article 82(2) is to exclude discrimination in criminal proceedings on the basis of nationality.

The European Treaties do not expressly confer competence to the EU to legislate on detention conditions, but arguments have been advanced that there is a competence to do so. It is generally accepted that pretrial detention (PTD) falls within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU, as the conditions of PTD form part of how the state treats individuals in criminal procedure.

Concerning post-trial detention conditions, while Article 82(2)(b) TFEU specifically refers to the rights of individuals in criminal procedure, it is not clear whether this phrase should be interpreted restrictively so as to leave post-trial detention conditions out of the scope of the Article. The Stockholm Programme and the 2009 Roadmap on Procedural Rights appear to allow for this reading and the European Parliament (EP) formally called for legislative action in this regard. Case law from the CJEU in 2016 (the cases of *Aranyosi and Căldăraru*) highlight that poor detention conditions may constitute an obstacle to the use of mutual recognition instruments, such as the EAW, and in those cases the CJEU did not distinguish between pre- and post-trial detention in its rulings.

State of play, gaps and barriers in relation to the mutual recognition instruments

Two of the mutual recognition instruments examined in this study, the FD EAW and the Directive on the EIO, aim to facilitate cross-border prosecution. The FD EAW provides a process for requesting the surrender of individuals so that a criminal prosecution or custodial sentence

can be carried out. The FD EIO – the most recent instrument – provides a way for Member States to obtain evidence from one another in cross-border criminal cases

Three of the instruments are designed to improve a detained persons' situation in light of free movement. FD TOP provides a mechanism to transfer a convicted person from a Member State where the sentence was given to a different state, typically that of his/her nationality or residence, so that the sentence can be served there. FD PAS provides a similar mechanism for probation orders and alternative sanctions, and the FD ESO enables pretrial supervision orders issued in one Member State to be carried out and enforced in another state.

Chapter 2 presents evidence collected in the course of this study in relation to the current state of play and corresponding gaps and barriers in European cooperation and action in relation to these instruments.

In terms of the content of the measures, a common criticism is that there is limited ability to refuse execution of the instruments on fundamental rights grounds in all but the EIO. Relatedly, risks to fundamental rights could stem from the fact that the explicit consent of individual being transferred is not always needed, rights to appeal transfers are not included in any of the FDs and procedures to ensure information, understanding and translation are not specified (in FD TOP, ESO or PAS). FD TOP does not protect against the risks of a de-facto deterioration of prisoner's situation as a result of a transfer. In relation to the implementation of the measures, not all Member States include specific measures to protect vulnerable persons in relation to FD TOP.

At a practical level, implementation of FD TOP appears to be hampered by a limited awareness of the measure among practitioners. This could result in under-use of the measures and in turn this could be to the detriment of individuals (since the use of these instruments may put some suspects or prisoners in a better position, as a result of either serving their sentence at home avoiding detention altogether)

ECtHR and CJEU jurisprudence is clear that Member States cannot transfer a person to a country where his/her fundamental rights may be at risk, and such a risk could be posed by poor quality detention conditions. However, national courts face challenges in accessing accurate and timely information about the standards and conditions of detention in other Member States. A further gap relating to FD TOP relates to inconsistent consideration of factors contributing to social rehabilitation in decision making about transfers, with evidence of variability in what courts consider.

State of play, gaps and barriers relating to the measures contained in the 2009 Roadmap

In 2009 the Council of the EU adopted a resolution on a 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings', inviting the Commission to submit specific proposals for strengthening procedural rights of suspected or accused persons in criminal proceedings. In response to the 2009 Roadmap on procedural rights, six Directives and one Commission Recommendation have been adopted:

Directive 2010/64/EU on the **right to interpretation and translation** in criminal proceedings

Directive 2012/13/EU on the **right to information** in criminal proceedings

- Directive 2013/48/EU on the **right of access to a lawyer** in criminal proceedings and on the right to communicate upon arrest
- Directive 2016/343/EU on **the presumption of innocence** and the **right to be present at trial** in criminal proceedings
- Directive 2016/800/EU on **procedural safeguards for children** who are suspects or accused persons in criminal proceedings
- Commission Recommendation on **procedural safeguards for vulnerable persons** suspected or accused in criminal proceedings
- Directive 2016/1919/EU on **legal aid** for suspects or accused persons in criminal proceedings.

The transposition deadline for the directives on legal aid and presumption of innocence and for the directive on safeguards for children is not until 2019. The deadlines for the other instruments have passed, with all or most Member States reporting transposition.

Chapter 3 presents evidence collected in the course of this study in relation to the current state of play and corresponding gaps and barriers in European cooperation and action in relation to the Roadmap measures. The most pressing gap is that there is currently no EU legislation on PTD, which is widespread throughout the EU. There is only a non-binding recommendation on procedural safeguards for vulnerable adults.

On the issues covered in the Roadmap on which there has been a Directive, the gaps arise where the quality of implementation does not match the requirements of the Directives or does not, in practice, protect rights. For example, where lawyers are provided but are passive, where the quality of legal aid and translation is low, or where the provision of the Letter of Rights is not timely.

A third potential gap relates to remedies. Analysis of the Directives by the research team indicates that three of the Directives²⁰⁴ include general statements obliging Member States to provide effective remedies, two include specific guidelines,²⁰⁵ and one²⁰⁶ does not foresee any remedies. Even where a directive does specify a remedy not all Member States have implemented this (for example, not all Member States have introduced complaint procedures relating to interpretation and translation).

Lastly, the Directives allow extensive grounds for Member States to derogate from the protection of rights. For example, the Directive on the right to a lawyer has been criticised for the broad scope of the derogations allowed, the Directive on safeguards for children allows derogation from the duty to provide an assessment.

Gaps and barriers in relation to detention conditions

There is currently no EU legislation specifically addressing detention conditions, although the Directive on procedural safeguards for children lays down minimum rules with respect to detention conditions for children. There are a large number of international standards on detention conditions in international treaties and non-binding rules. Chapter 4 describes these standards and sets out findings about the extent to which conditions of imprisonment and detention fall below these standards in the EU.

²⁰⁴ Directive on the right to information, Directive on procedural safeguards for children in criminal proceedings and Directive on the right to legal aid.

²⁰⁵ Directive on the right of access to a lawyer and Directive on the presumption of innocence.

²⁰⁶ Directive on the right to interpretation and translation.

Chapter 4 also outlines two key mechanisms for monitoring and enforcement. The CoE Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) examines compliance with the European Convention Against Torture through periodic site visits in individual Member States. The UN Committee against Torture (CAT) and Subcommittee on Prevention of Torture (SPT) (for countries that ratified the Optional Protocol to the UN Convention Against Torture (OPCAT)), involves country visits by the SPT and the establishment of National Preventive Mechanisms (NPMs) tasked with examining the treatment of detained persons and with making associated observations, recommendations and proposals.

There is strong evidence from CoE data and a number of research studies that detention conditions continue to fall short of required standards in numerous European countries. Overcrowding appears to be a particularly widespread problem, which can have knock-on effects on access to health services, sanitation, time out of cell, and so on.

The second key gap identified in relation to detention conditions stems from limitations in the monitoring mechanisms. The CTP and SPT have limited resources, monitoring visits as not frequent and neither of these bodies have robust enforcement powers. In relation to the NPMs, there appears to be little awareness among the judiciary of these mechanisms and questions have been raised about their independence from government.

Assessment of impacts of the gaps in terms of protecting fundamental rights and freedoms

Chapter 5 presents the assessment of the impact of each of the gaps identified in terms of the economic impact and the impact at individual level in terms of protecting fundamental rights and freedoms.

A quantitative, costed estimate of the impact was possible in relation to a few specific gaps in relation to which data were available: the cost of additional time spent in prison as a result of inappropriate use of the FD TOP and the costs of PTD. For other gaps, a qualitative assessment was undertaken in order to identify the gaps that are likely to have the most significant impact.

As explained in Chapter 5, the qualitative assessments were undertaken by articulating a likely scenario for each gap, thinking about how it was most likely to impact in a particular case. Each scenario was then categorised according whether the gap or barrier constitutes a *de facto* erosion of the right, or whether it is a *de facto* denial of the right. In making the assessment, the research team did not take into account how common the gap was (i.e. in how many Member States or cases the gap occurs), since data to support such an assessment are not available. Of course, the same gap could have quite different consequences for individuals, depending on their circumstances, needs and the particulars of the case. In the absence of better data, the assessment is intended to provide a starting point for understanding relative impacts at the individual level.

In relation to the mutual recognition instruments, the qualitative assessment indicated that almost all of the gaps identified are likely to lead to a *de facto* denial of the right, having the potential to impact on the fundamental rights of individuals. A quantitative exploration of the impact of these gaps enabled the research team to produce costs per day per Member State associated with a *de facto* prolongation of sentence following an incorrect application of FD TOP. These estimates are a tool that Member States and others could use to explore the potential impact for the state and the individual concerned.

In relation to the Roadmap measures, again, the qualitative assessment highlights that it is likely, in the scenarios suggested by the research team, that the identified gaps could have a significant impact at the individual level, in terms of protection of fundamental rights. Focusing on the impact of the lack of EU legislation in relation to PTD, the research team estimated the total cost of PTD across Member States and estimated how this might change under a number of scenarios. We found that one day in PTD per detainee costs on average about € 115, with significant cost variation across Member States. Last year, more than 100,000 people were held in PTD in the EU. The total cost of PTD, including the cost to the public related to running pretrial facilities (including prison) and individual costs related to average income and property loss is about € 1.6 billion.

There is no robust quantitative evidence as to the level of PTD that is excessive, but to explore the possible impact of reducing excessive PTD, the research team looked at two scenarios:

Scenario 1: Reduction of average length of time spent in detention and level of individuals in PTD at any given point in time to the EU average.

Scenario 2: The number of individuals held in PTD is reduced in each Member State by the average proportion of people on trial who are acquitted in a given country.

The findings of this estimation showed that if all countries reduced the average length of PTD to the EU average (in length and scale), that would reduce to overall costs by about € 707 million. If all countries reduced the current scale of PTD by their average estimated rate of acquittal, we estimate that this could reduce the cost by about € 162 million.

In relation to detention conditions, one indication of the impact of the identified gaps is that the ECtHR has found violations in relation to approximately half of the sections of the European Prison Rules (EPR). A quantitative analysis found that higher levels of overcrowding are strongly associated with levels of suicide. In other words, countries with overcrowded prisons record a higher number of inmate suicides and the observed difference in the number of suicides, when controlling for other potential confounding factors, cannot be explained by random variation. This means that reductions in overcrowding in European prisons, all else being equal, can be expected to result in fewer suicides among inmates.

Policy options

Chapter 6 sets out possible policy options for action at EU level that could address the identified gaps and barriers.

The options are summarised in the table below. Chapter 6 provides more detail in terms of describing what each option entails, whether new legislation is needed, an assessment of EU competence to act, the possible EU added value stemming from the option and the challenges and limitations to each option.

■ **Table S1: summary of policy options**

Policy option	Gaps addressed
Ensuring better compliance with international obligations	
1a. Pursue EU accession to the ECHR	This policy option potentially addressed all of the gaps and barriers identified in this study, since accession to the ECHR is intended, at a high level, to add more scrutiny of EU action, and to ensure consistent interpretation of fundamental rights standards between the EU and CoE.
2. Ensuring better compliance with EU values of democracy, rule of law and fundamental rights	

2a. Undertake institutional changes to EU monitoring and enforcement mechanisms	Similar to Option 1, this option aims at improving, overall, the mechanisms available to EU institutions for monitoring and enforcement relating to serious and systematic fundamental rights violations.
2b. Provide support to existing monitoring mechanisms through soft measures	This option particularly addresses gaps related to conditions of imprisonment through improving monitoring arrangements.
2c. Establish an EU monitoring system for rule of law, democracy and fundamental rights	Similarly to Option 1, this option aims at improving the system and mechanisms available to EU institutions for monitoring and enforcement relating to serious and systematic fundamental rights violations.
3. Ensuring proper implementation of EU legislation	
3a. Support the implementation of existing EU legislation through soft measures	This action could address a number of gaps related to the mutual recognition instruments and the Roadmap measures.
3b. Enforce the implementation of EU legislation through existing mechanisms	This action could address gaps in the Roadmap where implementation means rights are not protected in practice
4. Reviewing existing EU legislation to ensure better fundamental rights compliance	
4a. Amend existing mutual recognition instruments	This action could address a number of gaps related to the scope of the mutual recognition instruments, such as limited fundamental rights grounds for refusal, lack of consent needed to transfer etc.
4b. Amend existing Roadmap Directives	This action could address a number of gaps related to the scope of the Roadmap measures, such as extensive derogation, in effective remedies etc.
5. Enacting additional EU legislation	
5a. Expand the scope of existing EU legislation in the domain of procedural rights	This action could address situations where the cause of a gap is the scope or coverage of legislation. The key gap here is the absence of EU measures related to PTD. It could also address the gap relating to detention conditions continuing to fall short of required standards in numerous European countries.
5b. Introduce minimum EU standards on detention conditions	This action could address the gap relating to detention conditions continuing to fall short of required standards in numerous European countries.

- Policy option conclusions

Overall, possibilities for action identified by the study are mostly non-legislative and relate to supporting the implementation of existing mechanisms, modifying or improving (and increased use of) existing monitoring mechanisms at the EU and international level, or better collection and dissemination of systematic information to allow further assessment of the scale of the procedural rights challenges and to inform decision-making in national courts.

A challenge relating to recommending policy measures in relation to post-trial detention conditions, is that it is not clear if the EU has the competence to legislate to introduce common standards. The conditions of PTD fall within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU, but it is not clear whether this should be interpreted restrictively so that post-trial detention conditions are out of the scope. The EP

called on the Commission to introduce minimum standards for prison and detention conditions.

A cross-cutting limitation relevant to many of the policy options is that it is hard to assess the extent to which they would result in improved procedural rights and detention conditions. The limited evidence we have collected about the barriers to improvements (the reasons why procedural rights are not protected) indicate that financial resources and the culture, training and skills of legal (and other) professionals are the key factors to overcoming many of the barriers, highlighting the importance of sharing best practice and capacity building.

Chapter 1 Introduction

I – Background

People who are suspected or accused of criminal offences, who are subject to criminal justice processes or who are held in prison are in a vulnerable position and face many possible threats to their fundamental human rights. Rights to liberty, protection from inhumane and degrading treatment, protections for privacy and family life – among others – are all intimately engaged when a person is involved in criminal justice systems. Procedural rights aim to prevent the arbitrary or oppressive exercise of power by the state, thus enhancing freedom, liberty, democracy and the rule of law. The rights to be presumed innocent, to have access to independent legal advice and to understand the case against them, among other rights, are at the heart of maintaining a free and fair society.

This report looks at the protection of procedural rights and at the potential added value of existing (and possible further) action at the EU level to ensure that these rights are respected in practice. Procedural rights and conditions during imprisonment are inextricably linked to the European Union's (EU)'s fundamental values and the creation of an Area of Freedom, Security and Justice (AFSJ).

This report particularly looks at procedural rights and detention conditions from the perspective of suspects and accused persons; understanding the ways in which their procedural rights are currently protected, gaps where there is a lack of protection, and the impacts for individuals and their families of these gaps, including impacts on physical and mental health and employment.

This report, therefore, engages with issues that are not only central to the concerns of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), but are of direct importance to all EU citizens and residents and fundamental to a modern, fair society.

- What are procedural rights?

The term procedural rights refers to a broad range of rights of individuals involved in criminal justice proceedings. Such a broad definition can cover the rights of suspects and defendants, as well as other participants such as victims and witnesses. The Fundamental Rights Agency (FRA) describes procedural rights in terms of 'access to justice' (FRA, 2016d), stressing that these go beyond just having a case heard in court or the services of a lawyer, but extends to an effective remedy, fair trial, legal aid and so on.

The longest-standing enumeration of kinds of procedural rights is the European Convention on Human Rights (ECHR). The ECHR protects procedural rights to: liberty and security (Article 5 ECHR);²⁰⁷ fair trial (Article 6 ECHR);²⁰⁸ information and translation (Articles 5 and 6 ECHR);²⁰⁹

²⁰⁷ Covered by Article 6 (Right to liberty and security) of the CFREU.

²⁰⁸ Covered by the second paragraph of Articles 47 (Right to an effective remedy and to a fair trial) and 48 (Presumption of innocence and right of defence) of the CFREU.

²⁰⁹ Covered by Article 6 (Right to liberty and security) and 48 (Presumption of innocence and right of defence) of the CFREU.

prohibition of punishment without a law (Article 7 ECHR);²¹⁰ appeal (Article 2 of Protocol 7 ECHR); compensation for wrongful conviction (Article 5 ECHR);²¹¹ and not to be tried or punished twice for the same act or omission (Article 4 of Protocol 7 ECHR).²¹² These Articles of the ECHR set out rights at a high level, and under each Article, the European Court of Human Rights (ECtHR) jurisprudence articulates specific rights. As this jurisprudence develops and responds to the changing landscape, new kinds of procedural rights emerge and are delineated. Since the entry into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU (CFREU) has replaced the ECHR as the main codified source of fundamental rights in the EU, although the Court of Justice of the European Union (CJEU) continues to rely heavily on the ECtHR's case law as a persuasive source of inspiration and vests it with exceptional status and force within the EU legal order.

Beyond the CFREU and the ECHR, there are United Nations (UN) and other international standards and forms of cooperation (for instance, in the area of extradition) setting out procedural rights protections. In addition, academic and practitioner literature has identified a range of issues in relation to which procedural rights protections may arise or be needed (Matt, 2017, Mitsilegas et al., 2016, Vermeulen et al., 2011). For example, rights related to conflict of jurisdictions,²¹³ the admissibility and free movement of evidence and detention in police custody.

Procedural rights are engaged in both national and cross-border cases, with the latter giving rise to particular threats to rights connected to being accused, standing trial or serving a sentence in a country other than one's home nation.

In terms of the temporal scope of procedural rights, the ECtHR has interpreted the starting point of criminal proceedings (i.e. the point of 'charge') to be the moment when an individual is notified by the competent authority of an allegation that he or she has committed a criminal offence (*Deweert v Belgium*). The ECtHR has also observed that Article 6 ECHR shall apply in a substantive way, namely every time the situation of the suspect has been "substantially affected" (*Deweert v Belgium; Neumeister v Austria; Eckle v Germany; McFarlane v Ireland*).²¹⁴ Broadly, CJEU case law has followed the jurisprudence of the ECtHR in interpreting the temporal scope of procedural rights as covering 'criminal proceedings', which covers the period between the notification by the competent authority until the sentencing or acquittal of the accused, as have EU policymakers.²¹⁵

²¹⁰ Covered by Article 49 (Principles of legality and proportionality of criminal offences and penalties) of the CFREU.

²¹¹ Covered by Article 6 (Right to liberty and security of the CFREU).

²¹² Covered by Article 50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the CFREU. This is also protected in Article 54 of the Schengen Treaty.

²¹³ Situations where multiple countries can claim jurisdiction in a given case, particularly pertinent to rights issues when there are differences between the two countries in aspects such as possible sanctions. One possibility to address issues stemming from conflicts of jurisdictions is to systematically introduce the *lex mitior* principle to EU judicial cooperation mechanisms. This would require the application of the most lenient of the possibly applicable standards, to the benefit of the individual involved. See, for example, De Bondt & Vermeulen (2010).

²¹⁴ The ECtHR has observed that Article 6 ECHR also applies when the suspect learns about the investigation through unofficial sources Cras. & De Matteis. (2013a).

²¹⁵ This is in the text of the various Directives in the area of procedural rights discussed in Chapter 3. The original Commission proposal was amended in order to meet the standards set out by the jurisprudence of the ECtHR. Directives apply from the time that the persons concerned are made aware by the competent authorities of a Member State, by official notification or otherwise.

As described in detail in Chapter 3, there are a number of EU measures that aim to introduce common standards in relation to procedural rights across the EU. In 2009, the Council endorsed the *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* ('the 2009 Roadmap') (Council of the European Union, 2009) and invited the European Commission to submit proposals for specific legislative measures. This process has so far resulted in the following legislation:

- Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU).²¹⁶
- Directive 2012/13/EU on the right to information in criminal proceedings.²¹⁷
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.²¹⁸
- Directive 2016/343/EU on the presumption of innocence and the right to be present at trial in criminal proceedings.²¹⁹
- Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings.²²⁰
- Commission Recommendation 2013/C 378/02. on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.²²¹
- Directive 2016/1919/EU and Commission Recommendation on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.²²²

One issue covered in the Roadmap that has not yet been subject to EU measures is pre trial detention (PTD) – the practice of holding a person in custody while they await trial. The practice of PTD closely engages the right to liberty and the presumption of innocence. Calls for EU action that might reduce the extent of the use of PTD have been made by the European Parliament (EP) (European Parliament, 2016b), international organisations and non-government organisations such as Fair Trials (2016e), and PTD was covered in a 2011 Green Paper on detention (European Commission, 2011d).

- **What are detention conditions?**

Being held in detention – either pretrial or as part of a sentence – directly affects a range of fundamental rights to liberty, family and privacy. Treaties (such as the ECHR, the European and UN Convention on the Prevention of Torture, and the International Covenant on Civil and Political Rights (ICCPR)), recommendations from the Council of Europe (CoE) and in ECtHR case law have evolved to specify protected features and/or minimum standards in the conditions of detention in order to protect fundamental rights. Commonly, the following are included:

- Conditions of imprisonment – such as how many people can be held in a prison cell, the ability to contact family and lawyers, and the ability to have time out of cell.
- Healthcare.
- Good order.

²¹⁶ [2010] OJ L 280/1.

²¹⁷ [2013] OJ L142/1.

²¹⁸ [2013] OJ L294/1.

²¹⁹ [2016] OJ L65/1.

²²⁰ [2016] OJ L132/1.

²²¹ [2013] OJ C378/2.

²²² [2013] OJ L294/1.

Management and staff.

Inspection and monitoring.

Specific conditions for untried prisoners and for sentenced prisoners, respectively.

There is currently no EU legislation providing harmonised standards on detention conditions, although conditions of detention are mentioned in the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Detention conditions are primarily governed by international non-binding rules. Of these, the most prominent are the European Prison Rules (EPR) and the Mandela Rules. There is extensive case law from the ECtHR setting out specific criteria on detention conditions, and we return to this in Chapter 4 and Chapter 5.

- Protection of procedural rights and detention conditions in the EU

This report looks at whether procedural rights are protected in practice and whether conditions in which people are detained meet international standards. Table 1 sets out the number of ECtHR judgments against Member States, disaggregated by relevant ECHR Articles. This provides a high level indication of the extent to which procedural rights may be violated in the EU. Of course, a high number of violations may be a function of awareness on the part of plaintiffs of the possibility of seeking a remedy at the ECtHR, and ECtHR judgments represent only a small portion of all procedural rights complaints, as all applications to the ECtHR must have exhausted available domestic remedies first. Therefore, ECtHR summary statistics are at best indicative of the overall picture as they do not provide much disaggregated detail to understand the causes of these violations.

■ **Table 1. ECtHR judgments against EU Member States in which the ECtHR found a violation, by type of violation (data for 2016)**

Area	Relevant ECHR Article	Number of violations
Right to liberty and security	Article 5	61
Right to a fair trial	Article 6	74
No punishment without law	Article 7	1
Right not to be punished twice	Protocol 7, Article 4	1

1. Note: Right to fair trial does not include violations of ‘length of proceedings’ and ‘non-enforcement’. The total number of violations of Article 6 in 2016 found by the ECtHR against EU Member States was 146.

II – Objectives and scope of this report

This document has been prepared as part of a study into the Cost of Non-Europe in relation to procedural rights and detention conditions conducted for the European Added Value Unit, Directorate General for Parliamentary Research Services (DG EPRS) of the EP. Cost of Non-Europe reports are intended to study opportunities for gains or the realisation of a public good through common action at the EU level. These reports attempt to identify areas that might have expected benefits from deeper EU integration or coordination.

This study into the Cost of Non-Europe in relation to procedural rights and detention conditions aims to answer the following questions:

1. What is the current state of play and the corresponding gaps and barriers in European cooperation and action in the area of procedural rights and detention conditions?

2. What is the impact of these current gaps and barriers – in terms of the economic impacts and impact at individual level in terms of protecting their fundamental rights and freedoms?
3. Are there potential options for action at EU level that could address these gaps and barriers and what are their potential costs and benefits?

Central to the objectives of this report is understanding whether (and how) existing EU action adds value by enhancing protection for rights and where (and how) further EU action could add further value, in line with principles of legality, subsidiarity and proportionality.

As outlined above, procedural rights have a very broad scope. In this report a subset of procedural rights issues have been selected for focus. The scope of this report is as follows:

Procedural rights of suspects and accused persons in relation to the five key mutual recognition instruments: the European Arrest Warrant (EAW); the European Investigation Order (EIO); the European Supervision Order (ESO); the Framework Decision on the Transfer of Prisoners (TOP); and the Framework Decision on the recognition of Probation Measures and Alternative Sanctions (PAS).

Rights of suspects and accused persons in criminal proceedings included in the 2009 Roadmap, including PTD.

Detention conditions – both pre- and post-trial.

Topics not in the scope of this study are:

Measures relating to victims and witnesses.

Conflicts of jurisdiction.

Procedural rights not captured in the 2009 Roadmap.²²³

The scope of the report was decided in discussion with the European Added Value Unit, DG EPRS of the EP, and is intended to provide insight to key questions of interest to the EP's LIBE Committee.

A number of considerations were relevant to deciding the scope of the report. For example, victims and witnesses are covered in this report to some extent, in that Article 2(3) of the Directive on the right of access to a lawyer in criminal proceedings, discussed in Chapter 3, provides protection for people who become suspects or accused persons during questioning. Further, it was taken into account that a number of reports are expected soon on the Victims' Rights Directive; the Commission is preparing a transposition report,²²⁴ the EP is preparing an implementation report and the European Parliamentary Research Service is preparing a European Implementation Assessment.

Each of these excluded issues has been subject to discussion and debate. In relation to witness protection, the CoE has made recommendations (Council of Europe and Committee of Ministers, 1997), the Commission has examined the feasibility of EU legislation (European Commission, 2007) and the EP has called on the Commission to legislate in this area (European Parliament, 2016b). There is a Framework Decision (FD) 2009/948/JHA on prevention and

²²³ Matt (2017) called for the adoption of a second procedural Roadmap, including – among others – the following areas: witnesses' rights and confiscatory bans, admissibility and exclusion of evidence and other evidentiary issues, conflicts of jurisdiction and *ne bis in idem*, remedies and appeal, compensation.

²²⁴ Article 29 of the Directive states 'The Commission shall, by 16 November 2017, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive'.

settlement of conflicts of exercise of jurisdiction in criminal proceedings, adopted in 2009 following attempts to introduce a FD to regulate the *ne bis in idem* principle (a requested person does not face repeated arrests for the same circumstances) in 2005, which were not met with agreement in the council (European Commission, 2005). The EIO (discussed in Chapter 2) is relevant to the admissibility of evidence, but does not introduce minimum standards.

Also not included in the scope of this paper, but relevant to procedural rights and mutual recognition, is data protection legislation, which has implications for the transfer of sanctions and related information under mutual recognition instruments (Tomkin et al., 2017).

III – EU competence in relation to procedural rights and detention conditions

An important starting point for all Cost of Non-Europe studies is to understand the competence the EU has to act in a particular area. This section firstly sets out the existence of EU competences to take **legislative action**. It secondly examines the **limits on the exercise** of such competence. Thirdly, the EU's competences to take **non-legislative measures** are analysed, focusing on three examples in particular: accession to the ECHR; measures to stimulate Member States to give better effect to EU law; and Article 7 Treaty on the European Union (TEU).

The EU's competence to legislate on criminal matters, including on procedural rights and detention conditions, forms part of the EU's AFSJ, introduced by the Treaty of Amsterdam.²²⁵ The AFSJ is fundamentally built on the principle of mutual recognition²²⁶ and respect for national legal systems and traditions.²²⁷ Harmonisation of laws is partially excluded and largely limited to a means to facilitate mutual recognition.²²⁸

The EU's competences for criminal matters within the AFSJ emerged from judicial cooperation in several phases. The **Schengen Agreement (1985)** established the Schengen area and included certain rules on police and judicial assistance in criminal matters (i.e. extradition and transfer of enforcement of criminal judgments). In 1993 the **Treaty of Maastricht** stipulated that judicial cooperation should be regarded as a matter of common interest to ensure the free movement of

²²⁵ Following the entry into force of the Treaty of Amsterdam, Article 2 TEU set the objective 'to maintain and develop the Union as an area of freedom, security and justice'. The AFSJ concerns *inter alia* the free movement of citizens and their protection. In the field of criminal law and justice, it seeks to strengthen police and judicial cooperation between Member States, while also respecting the human rights and fundamental freedoms of EU citizens (Hodgson, 2016).

²²⁶ The establishment of an EU area in which citizens may move freely has not been coupled with a single area of law. However, Member States have traditionally resisted European integration in the field of law enforcement. For this reason, the application of the principle mutual recognition in this field – which provides a simple and quasi-automatic mechanism whereby national decisions are recognised and enforced in Member States different to the one where they had been taken – has provided a system that facilitates interaction between Member States' criminal systems. Mitsilegas (2016).

²²⁷ The general obligation to respect legal systems and traditions of Member States in the AFSJ is laid down in Article 67(1) TFEU. Article 82(2) and (3) TFEU goes beyond that general obligation by establishing that EU measures falling under that provision must 'take into account' the differences between the legal traditions and systems of the Member States and by introducing an 'emergency brake' allowing Member States that feel a proposed measure would affect fundamental aspects of its criminal justice system to request the suspension of the process and the referral of the measure to the European Council.

²²⁸ While the Tampere conclusions of the European Council referred to mutual recognition as the 'cornerstone' of EU criminal law, they also mentioned the 'necessary approximation of legislation' as a means to facilitate cooperation between authorities and judicial protection of individuals (§33). (European Council Presidency, 1999). The principle of mutual recognition was later confirmed in the Hague and Stockholm programmes, as well as by Title V of the Treaty of Lisbon (AFSJ).

persons. At the time, judicial cooperation took place under the third pillar of the then European Union and followed more intergovernmental rules. The **Treaty of Amsterdam (1999)** brought the Schengen acquis within the EU legal order and took first steps towards a body of European criminal law with the creation of the AFSJ. Finally, in 2009 the **Treaty of Lisbon** abolished the pillar structure and brought AFSJ within the Treaty on the Functioning of the European Union (TFEU), with the consequence of normalising this policy area by making it largely subject to the ordinary legislative procedure, conferring enforcement powers on the Commission and bringing it under the jurisdiction of the CJEU. It also extended the EU's competences for criminal matters.

The **pre-Lisbon difficulties** that the EU faced when taking legislative action in this field are best illustrated by the failure to adopt even the draft FD on certain procedural rights in criminal proceedings throughout the EU, including, among others, rights to legal advice and the right to interpretation and translation in criminal proceedings (Mitsilegas, 2016). A large number of Member States opposed EU competence on several issues and voiced their concern to protect the diversity of national choices in the context of criminal procedure. In combination with the unanimity requirement under the then third pillar, even the *modest scope* of the proposed FD proved too ambitious (Mitsilegas, 2016). The political salience of policy choices framed as balancing between collective security and individual procedural rights made it impossible to reach EU-wide agreement.

Post-Lisbon, Article 82(2) TFEU is the express legal basis conferring on the EU the competence to adopt minimum standards in criminal proceedings. Article 82(1) TFEU emphasises that the basis of judicial cooperation is mutual recognition. This is the starting point for the EU's competence under Article 82(2) TFEU, both in terms of justification and in terms of setting limits (approximation is permitted to the extent necessary to facilitate mutual recognition). One of the underlying general objectives of Article 82(2) is to exclude discrimination in criminal proceedings on the basis of nationality.

This general objective is in line with the right to equality before the law in Article 20 of the CFREU, the right to non-discrimination on grounds of nationality in Article 21(2) of the CFREU, and the policy objective of combatting discrimination and exclusion in Article 3(3) TEU. Moreover, Article 18 TFEU was introduced to prohibit 'any discrimination on grounds of nationality' and procedural rights are core citizenship rights. Article 18 TFEU governs situations where no other specific rights of non-discrimination exist (Weiss and Kaupa, 2014).

Article 82(2) TFEU also prescribes a number of express limitations on the EU's competence. The EU legislator can only choose the instrument of a Directive. It is a functional competence in the sense that it is limited to measures necessary to facilitate mutual recognition. Finally, the EU's competence is limited to criminal matters having a cross-border dimension. The **functional nature** of the EU's competence under 82(2) TFEU requires that the EU only adopts minimum standards for criminal procedure in the national context to the extent that they are necessary to ensure mutual recognition. As a matter of principle it is not a self-standing legal basis for human rights legislation. This functionality, however, justifies a broad scope of action. Effective functioning of mutual recognition instruments requires a high level of deep and comprehensive mutual trust,²²⁹ which in turn requires a holistic approach. Deep trust means that Member States presume that all other Member States have not only made a formal commitment to certain standards, as all of them have as Contracting Parties to the ECHR and as EU Member

²²⁹ See e.g. Recital 4 of Directive on the right to interpretation and translation in criminal proceedings. For the relationship between mutual trust and mutual recognition (Eckes, 2018b).

States, but also that they comply with these standards in practice. Comprehensive trust refers to the understanding that the whole criminal justice system complies with these standards, at all levels and in all situations.

The European Treaties do not expressly confer competence to the EU to legislate on detention conditions. PTD falls within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU. The conditions of PTD form part of how the state treats individuals in criminal procedure. This is also the reading of the majority of Member States, which did not raise objections to EU law making in this area on competence grounds in their response to the Commission 2011 Green Paper on detention.²³⁰ The EP also expressed the desire to see EU action in this area based on Article 82(2)²³¹ and expressly links its recommendation of introducing a fundamental rights exception into the EAW or mutual recognition instruments in general to its concerns about the conditions in prisons and other custodial institutions (European Parliament Committee on Civil Liberties Justice and Home Affairs, 2014, European Parliament, 2015). Moreover, the cases of *Aranyosi and Căldăraru* 2016 (discussed in greater detail in Chapter 2) highlight that in practice detention conditions may not only breach fundamental rights as guaranteed under the CFREU but may constitute an obstacle to Member State compliance with mutual recognition instruments, such as the EAW.²³²

Concerning **post-trial detention** conditions, while Article 82(2)(b) TFEU specifically refers to the rights of individuals *in criminal procedure*, it is not clear whether this phrase should be interpreted restrictively so as to leave post-trial detention conditions out of the scope of the Article. In this regard, the Stockholm Programme and the 2009 Roadmap on procedural rights appear to leave the door open to a broad notion of ‘criminal procedure’, which could include post-trial aspects such as sentence execution.²³³ The EP has repeatedly stated its position on this matter. In 2011, it formally called on the Commission to develop and implement minimum standards for prison and detention conditions (European Parliament, 2011) based on Article 82(2)(b), in order to ensure compliance with the CFREU, the ECHR and ECtHR case law. The CJEU made no distinction between the two above-mentioned cases of *Aranyosi and Căldăraru* (2016), one of which concerned an individual who had already been convicted. This makes the Court’s reasoning applicable and relevant both to pre- and post-trial detention. The FD TOP also expressly confirms this link between post-trial detention conditions and mutual recognition.

As expressly stated in Article 82, ensuring the preconditions for **mutual recognition** is the main motivator, objective and justification for the EU’s competence to establish minimum standards

²³⁰ Only two Member States (Denmark and Poland) expressed concerns about the competence of the EU, invoking the principle of subsidiarity. This opinion was also shared by one responding association – the German Association of Judges (European Commission 2011a).

²³³ For instance, Vermeulen et al. argue that while Provision 2.4. of the Stockholm Programme adopts a strict interpretation of criminal proceedings by referring exclusively to the rights of the accused and the suspect, provision 3.2.6 can be read as pointing to a certain level of uncertainty with regard to the competence of the EU by inviting the Commission to reflect on the issue further ‘within the possibilities offered by the Lisbon Treaty’. Furthermore, the 2009 Roadmap reflects this uncertainty when it establishes that ‘for the purposes of this Resolution’ criminal proceedings must be understood as covering pretrial and trial stages. This may imply that for purposes other than the Roadmap Resolution, post-trial issues may fall under the umbrella of ‘criminal procedure’. Another example in support of a broader definition of ‘criminal procedure’, i.e. that incorporating the post-trial phase, is Recital 5 of FD TOP, which makes an explicit reference to criminal proceedings in its discussion of the transfer of detainees (Vermeulen, et al., 2011).

for individual rights in criminal procedure. The principle of mutual recognition is central to the functioning of the AFSJ, the functioning of which requires equivalent protection in order to permit that national authorities treat the decisions of the authorities of other Member States as 'equivalent to decisions by one's own state' (European Commission, 2000). Member States agree to recognise and carry out judicial decisions made by authorities in another Member States *without undertaking their own review* (Tomkin et al., 2017). Thus, an EU citizen may be prosecuted, convicted and sentenced in one Member State different than her Member State of origin, and the Member State of origin will enforce the sentence against its own national laws, including detaining her.

Some scholars question how introducing EU-wide minimum procedural standards would enhance mutual trust and confidence (Vermeulen, 2014). However, a more detailed and, hence, higher level of procedural protection may reasonably be expected to facilitate mutual recognition. Indeed, the successful application of the principle of mutual recognition, understood as giving effect to decisions of the competent authorities of another Member State without carrying out any form of review, appears unattainable without a high level of **mutual trust** between Member States. National authorities at different levels must be able to trust in each other's criminal justice systems for them to give effect to EU mutual recognition instruments (Eckes, 2018b). Mutual trust can only exist if Member States have reason to be confident that all EU Member States comply with EU fundamental rights standards.²³⁴ While this does not require uniform standards in all Member States, it presupposes that the protection of procedural rights and detention conditions is equivalent in all Member States (Lenaerts, 2015). The general and abstract commitment to fundamental rights may not be enough to establish sufficient reason to presume equivalence. Arguably, agreement and commitment to more detailed *minimum* EU standards in criminal procedure and detention conditions, applicable both pre- and post-trial, may be necessary.

Detention conditions, both pre- and post-trial, are directly relevant to allow for the necessary trust in connection to all EU mutual recognition instruments that involve the transfer of a person. Examples are the EAR and the FD TOP. If stronger evidence demonstrated that poor detention conditions constitute in practice a core obstacle to the functioning of the EAW, using the functional competence of Article 82 TFEU to take EU legislative actions establishing minimum conditions is justified (Weyembergh, 2014). The precise scope of Article 82(2)(b) was subject of discussion during the negotiations of the children's rights Directive (Cras, 2016). In that debate, the European Commission and the Parliament took the view that standards on detention conditions could be adopted under Article 82. This opinion was opposed by at least some Member States, which argued that Article 82(2) TFEU was limited to the pretrial stages.²³⁵

Article 82 TFEU refers to 'a cross-border dimension'. The extent to which this affects EU competence to adopt standards applicable to national (i.e. not cross-border) cases is a matter that needs further clarification. The CJEU has not yet ruled on this point. Yet the post-Lisbon Directives on minimum standards in criminal procedure apply also in purely domestic cases.²³⁶

²³⁴ For the distinction between EU and national fundamental rights standards see Eckes, 2018b. On compliance with fundamental rights in general see Mitsilegas, 2012.

²³⁵ At the end of trilogue negotiations, the European Parliament formally agreed with the Council's view. However, this represents a political decision that should be viewed separately from the broader legal debate on EU competence in the area. The goal of the Directive was to respond to the call from the Council to adopt measures to ensure the rights of suspects and accused in criminal proceedings.

²³⁶ See, for example, Article 1(1) of Directive on the right to interpretation and translation; Article 1 of Directive on the right to information; Article 1 of Directive on access to a lawyer.

Legal certainty, equal treatment, the establishment of deep mutual trust in fundamental rights compliance between Member States and contextual arguments of Treaty interpretation strongly speak in favour of interpreting Article 82(2) as the legal basis for EU legislation, applicable not only to cross-border criminal proceedings, but also to strictly domestic cases. Most importantly, **a substantively unjustified** differentiation would eventually be detrimental to the protection of fundamental rights (European Commission, 2013b), including the right to equal treatment, and the building of mutual trust. Mutual trust in judicial justice within one legal order can only be built if sufficiently high (or at least equivalent) standards apply across the board in the jurisdictions of all other Member States (European Commission, 2013b). If Member States were at liberty to apply lower standards to purely domestic proceedings, this would not only be detrimental to legal certainty and equal treatment, but would also undermine mutual trust between judicial authorities.

A broad reading, covering all cases of criminal procedure, is suggested **by the different language used in Articles 81(3) and 82(2) TFEU**. Article 82(2) TFEU refers to ‘cross-border dimension’. Article 81(3) TFEU, by contrast, confers on the EU the power to adopt measures concerning family law cases with ‘cross-border implications’. The term ‘implication’ is more specific than ‘dimension’. Another indication of a comprehensive power is Article 83(1) TFEU, which concerns the EU power to adopt substantive criminal law provisions and also uses the term ‘cross-border dimension’. As Peers argues, harmonisation of substantive criminal law cannot reasonably be limited to cross-border cases (Peers, 2011).

Finally, in a significant number of cases, it is impossible to categorise *ex ante* criminal proceedings as either cross-border or domestic.²³⁷ The European Commission repeatedly pointed this out (European Commission, 2011e). Moreover, since the entry into force of the Lisbon Treaty, the CFREU is binding to EU primary law applicable to all actions of the EU institutions and to the Member States when they act within the scope of EU law (See Article 6(1) TEU and Article 51(1) CFREU). It applies to all situations with a certain degree of connection to EU law, including in cases where national legislation does not expressly or directly implement EU law (*Aklagaren v Hans Akerberg Fransson*; *Cruciano Siragusa v Regione Sicilia*). The latter excludes making a sharp distinction between two different levels of protection depending on whether a case has a cross-border dimension.

However, in the context of adopting the Directive on the right to information in criminal proceedings, the Council explicitly stated that its broad scope should not be interpreted as constituting a precedent for future work (Council of the European Union, 2011). It cannot hence be ruled out that future EU legislative measures relating to procedural rights are challenged as going beyond the competence conferred in the Treaties. Still, all experts interviewed in the course of this Cost of Non-Europe study who commented on the issue, while acknowledging the historical debate on EU competence in this area, generally considered this debate as settled in favour of a more expansive view of EU competence.

Once the EU possesses the formal competence to adopt legislative measures, the **exercise** of such a competence is subject to additional limitations flowing from other provisions of the Treaties, such as the principle of subsidiarity, proportionality, human rights and respect for

²³⁷ Peers points out that a better approach is to look at the ‘degree of likelihood that the rules in question will have a particular impact on cross-border proceedings’. In his view, this will be the case ‘whenever there is a “free movement clause” in the legislation [providing] that Member States could not refuse to recognize judgments and other decisions of judicial authorities on grounds falling within the scope of measures adopted pursuant Article 82(2) TFEU’ (Peers, 2016a).

national identities. The principle of subsidiarity is subject to judicial review,²³⁸ but has not so far proven to have much judicial bite. The CJEU only verifies 'whether the Union legislator was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level' (*Philipp Morris*). However, the principle of subsidiarity is highly relevant in the legislative procedure, in particular in the AFSJ where, for example, the threshold for the yellow card procedure (European Parliament, 2016b) is lowered to one quarter of all national parliaments.²³⁹ All EU legislation must be proportionate. Limiting EU action to adopting Directives, rather than regulations, and *minimum* standards for criminal procedure are concrete expressions of the principle of proportionality. The limitation to the instrument of a Directive should require the EU legislator to leave a certain leeway to Member States as to how EU legislation is implemented as long as their objectives are met. All EU legislation must meet the standards set out in the CFREU and in the ECHR. Beyond this, it is justified to expect that it not only codifies and gives structure and detail to the body of case law of the ECtHR, but also where appropriate extends the Strasbourg protection, which is also a *minimum* standard. Finally, Article 4(2) TEU requires the EU to respect national identities. The CJEU has interpreted this provision with a particular focus on the constitutional identity and the specificities of the national legal order, which also covers the national criminal justice system.

For a comprehensive legal culture that allows for mutual trust, actions **other than legislative action** may also be advisable. In the CJEU's post-Lisbon referencing practices, the CFREU has replaced the ECHR as the main codified source of fundamental rights. The ECHR however remains an important source of inspiration for the EU's general principles (Article 6(3) TEU). The CFREU was meant to incorporate the dynamic interpretation of the ECHR in the ECtHR's case law and has largely succeeded in achieving this objective (European Commission, 2005). Yet the CJEU continues to rely heavily on the ECtHR's case law as a persuasive source of inspiration and even vests it with exceptional status and force within the EU legal order (Tomkin et al., 2017).

The EU is not only competent to conclude an agreement on the **EU's accession to the ECHR**; the EU institutions are under an obligation to pursue accession (Article 6(2) TEU). While EU accession to the ECHR raises plausible concerns for the autonomy of the EU legal order (Eckes, 2017, Eckes, 2018a), the gains in terms of substantive protection remain questionable (Eckes, 2013).

A source of uncertainty in this regard (further discussed in Chapter 6) is, in particular, how to reconcile the preservation the functionality of EU's mutual recognition system with ECtHR approach of scrutiny in each case. This is another argument to support why a deep and comprehensive commitment to fundamental rights protection is needed by all national actors to ensure that the EU's mutual recognition system works and complies with the ECHR.

The holistic approach required to create an environment in which a high level of mutual trust is possible also requires taking action to **stimulate Member States to give better effect to EU law**. Provisions of Directives that confer rights on individuals are – under certain circumstances – susceptible of enjoying vertical have direct effect. Individuals can directly rely on them before national courts against the state. This will vest them with a certain level of inherent

²³⁸ Article 8 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality.

²³⁹ Articles 5(3) TEU and 69 TFEU in combination with Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality. Article 7(2) s.2 of Protocol No. 2 lowers the usual threshold of one third to one quarter for the AFSJ.

effectiveness irrespective of national implementation. Additionally, as stated above, the Lisbon Treaty has brought EU criminal law within the ordinary enforcement mechanisms under the European Treaties. This includes a strong role for the Commission in monitoring and taking enforcement action if Member States do not give adequate effect to EU law. The Commission's mandate extends more broadly to criminal procedure to ensure effectiveness of all rights under EU law and compliance with the CFREU. This mandate also covers adopting soft measures (e.g. training, handbooks and practitioner networks) supporting the effectiveness and compliance with EU law.

Article 7 TEU provides a formal legal mechanism for the EU to react to situations where there is 'a clear risk of a serious breach' of EU values by a Member State (Article 7 (1)) or where there is a 'serious and persistent breach' of EU values laid down in Article 2 TEU (Article 7(2)). The Member State concerned can ultimately be sanctioned through the suspension of membership rights (Article 7(3)). This mechanism covers a reaction by the institutions to poor detention conditions insofar as these constitute a serious and persistent breach of such values (i.e. the respect for human dignity and human rights). The Article 7 TEU mechanism is of high political and symbolic weight. In practice, Article 7 TEU confers on the EU, including the Commission, a far-reaching monitoring and enforcement mandate. Legal instruments in the AFSJ, such as the EAW, have specifically linked the limits of mutual recognition obligations to this mechanism.²⁴⁰ Hence, Article 7 TEU and the reference to the Article 7 TEU procedure in secondary law governing the cooperation in criminal matters justifies monitoring of Member State compliance with fundamental rights, explicitly mentioned as one of the values in Article 2 TEU.

Moreover, Article 7 TEU in combination with the principles of sincere cooperation in Article 4(4) and 13(2) TEU requires all actors involved (i.e. the EU institutions and the Member States) to cooperate constructively and in good faith to the objective of addressing breaches, but also to clear risks of a serious breach of the values that are the fundament for the EU as a Union of Law in Article 2 TEU.²⁴¹

IV – Methods and limitations of the study

The research activities undertaken to produce this research paper constitute:

- An analysis of the relevant mutual recognition instruments and Directives.
- A review of the literature, including academic papers, material published by the European institutions and publications from international organisations such as the FRA.
- Interviews with 10 expert stakeholders. The interviews were semi-structured, following a standardised topic guide, but allowing for a discussion of unanticipated topics. Interviewees were invited to provide comments on the following topics: EU competence; state of play and gaps in the areas of procedural rights and detention conditions; and options for policy action at the EU level. The topic guide is provided in Appendix G. Interviewees represented the following organisations and areas of expertise:
 - The Council Secretariat
 - Council of Bars and Law Societies of (CCBE)
 - World Prisons Research Programme
 - EP

²⁴⁰ See Recital 10 of the EAW Framework Decision; confirmed by Case C-168/13, *Jeremy F. v Premier Ministre* at para. 49.

- European Commission
- CoE
- European Prison Observatory
- Fair Trials
- European Criminal Bars Association
- FRA
- An analysis of available data and statistics and some economic modelling using these data. The economic modelling in this study specifically emphasises a calculation of the overall cost of PTD across EU Member States by estimating the cost to the public (e.g. administrative or budgetary cost of maintaining a prison system) as well as to individuals (e.g. loss of employment, loss of property). In addition, the study looks empirically at the associations between prison overcrowding, which serves as a proxy indicator for a bad detention conditions, and suicide rates in European prisons.

The study is subject to the following limitations.

Little systematic, pan-European data about respect for procedural rights of suspects and accused persons. While non-governmental organisations such as Fair Trials, and organisations such as the FRA, provide useful information about particular rights and useful case studies of infringements, there is no systematic monitoring of procedural rights standards *in practice*. This was noted in each of the Impact Assessments (IAs) preceding the Roadmap Directives. **This imposes limitations on our ability to understand how widespread or severe infringements of procedural rights are, and, in particular, imposes limitations on the ability to address research question 2, which calls for an assessment of the impact of identified gaps and barriers** at the economic and individual level. To mitigate this limitation we draw on other data (for example, judgements of the ECtHR and the views of expert interviewees) and employ scenario-based approaches to understand the potential impact of identified gaps and barriers, highlighting those that appear to have the most significant impact on individuals' fundamental rights. In Chapter 5, we explain how we have made a preliminary assessment of the impact of the identified gaps and barriers, given the data available.

Challenges in understanding the barriers (causes of the identified gaps). Possible causes of procedural rights infringements could be cultural, lack of financial resources, lack of professional training, etc. However, there is little systematic research that sheds light on the reasons why rights are or are not respected in practice.

Limited data about the characteristics of those in PTD in Europe. The CoE's annual penal statistics and others, such as the United Nations Office on Drugs and Crime (UNODC) database, provide quantitative measures on the state of play in the European prison system, including the scale of PTD. But these data, based on information collected at the Member State level, employ different definitions and are not directly comparable across countries. This issue is returned to in the policy options in Chapter 6, where possibilities to improve comparability of monitoring data are discussed. In addition, little is known about the characteristics of people in PTD. For instance, with regard to foreign nationals held in PTD, the proportion of foreign nationals is reported but no breakdown by EU/non-EU citizen is generally available. This lack of detailed data inhibits the scope and scale of any quantitative analysis in this area.

Chapter 2 State of play, gaps and barriers in relation to the mutual recognition instruments

This chapter addresses the first research question (What is the current state of play and the corresponding gaps and barriers in European cooperation and action in the area of procedural rights?) in relation to five mutual recognition instruments. We first describe the five instruments (including transposition assessments and where they exist), then outline findings as to the state of play and gaps and barriers.

I – Description of the five mutual recognition instruments

The mutual recognition of judicial decisions refers to the ‘process by which a decision usually taken by a judicial authority in one EU country is recognised and, where necessary, enforced by other EU countries as if it was a decision taken by the judicial authorities of the latter countries’ (EC, 2017g). Mutual recognition was designed to address issues arising from an EU environment characterised by free movement of people. As such it was decided that ‘a free circulation of people shall correspond to a free circulation of judicial decisions’ (EC, 2017g). Mutual recognition depends on mutual trust of Member State’s judicial systems. The Tampere European Council in 1999 declared that ‘mutual recognition should become the cornerstone of judicial cooperation in criminal matters’ and was endorsed in the subsequent programmes (Hague in 2004 and Stockholm in 2009) (Raffaelli, 2017).

- Instruments designed to facilitate cross-border prosecution

Framework Decision on the European Arrest Warrant

Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (FD EAW) was adopted on 13 June 2002 with the objective of simplifying and expediting the process of surrender between EU Member States. It was the first EU instrument that implemented the principle of mutual recognition of judicial decisions (Klimek, 2015) and had the objective of simplifying and expediting the process of surrender between EU Member States.

A EAW is ‘a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order’ (2002/584/JHA, Article 1(1)). It replaced a myriad of lengthy and complex extradition instruments and bilateral agreements between Member States, as well as existing CoE procedures in this area (Bures, 2010). The aim was to improve the cooperation of national judicial authorities in the EU (Klimek, 2015) and improve efficiency by instituting stricter deadlines for responding to and complying with warrants, as well as placing limits on acceptable grounds for refusal (Del Monte, 2014). Previously arrest and surrender procedures had been two separate legal acts, which under the EAW became merged into one ‘largely automatic extradition procedure’ (Tomkin et al., 2017, 19).

The following paragraphs briefly describe the main Articles of the FD. Their possible implications for the protection of fundamental rights are discussed in the section on the gaps and barriers pertaining to the mutual recognition instruments.

Article 2 defines the scope of the FD, listing 32 offences that warrant surrender under the EAW without necessitating establishment of double criminality (Article 2(2)). The EAW works in the following way: a Member State’s judicial authority is able to issue a request for the arrest and surrender for an individual for crimes punishable for a maximum period of at least one year or where a custodial sentence or detention order has been passed for a minimum of at least four months (Article 2(1)). According to the Commission *Handbook on how to issue and execute a European Arrest Warrant* published in September 2017 ‘issuing judicial authorities are advised to consider whether in

the particular case issuing a EAW would be proportionate [...] and whether any less coercive Union measure could be used to achieve an adequate result' (EC, 2017a).

The EAW rests on the principle that the executing Member State should comply without evaluating the 'substance of the accusation/conviction' (Del Monte, 2014, 8), but Article 3 outlines the cases in which Member States must refuse to execute an EAW:

1. If the offence is covered by an amnesty in the executing Member State (Article 3(1)).
2. If a Member State has already delivered a final judgement on the case for the same offence, given there was a sentence, the sentence has been served, is currently being served or can no longer be served (Article 3(2)).
3. If the subject of the EAW cannot be held criminally responsible the offence due to his/her age (Article 3(3)).

Article 4 provides seven further provisions for possible grounds for refusal to execute an EAW.

Article 5 outlines the guarantees the issuing authority is to give under specific circumstances, e.g. absentia cases, guarantees about the ability to apply for a retrial or be present at judgement (Article 5(1)), circumstances surrounding custodial life sentences or lifetime detention orders (Article 5(2)) and cases where persons for which an EAW has been issued are heard in one country before being returned to their country of nationality or residence to serve the order (Article 5(3)).

FD EAW was amended in 2009 (FD 2009/299/JHA) 'enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial' (Publications Office, 2015a). The 2009 amendment was designed to clarify the necessity to specify and differentiate grounds for refusal based on in absentia decisions (Klimek, 2015).²⁴²

The deadline for transposition into national law for FD EAW was 31 December 2003 (Tomkin et al., 2017, 19). To date, all Member States have entered the EAW into force, with the last Member States (Bulgaria, Romania and Slovenia) having done so in 2007 (European Judicial Network, 2017b).

In 2014, the EP adopted a resolution containing recommendations to the Commission on the review of the EAW and outlining legislative proposals.

European Parliament recommendations as to envisaged legislative proposals

The EP requested the Commission submit legislative proposals in the following areas:

- Validation procedure for EU mutual recognition instruments**, whereby a mutual recognition measure can, if necessary, be validated in the issuing Member State by a judge, court, investigating magistrate or public prosecutor, in order to overcome the differing interpretations of the term "judicial authority").
- Proportionality check for the issuing of Union mutual recognition legal instruments**, allowing a competent authority to assess the need for the requested measure, consider whether a less intrusive alternative measure exists and (following consultation with the issuing authority) to decide to withdrawal of a mutual recognition instrument.
- Consultation procedure between the competent authorities in the issuing and executing Member State to be used for EU mutual recognition legal instruments**, creating a standardised procedure whereby the competent authorities in the issuing and executing Member State can exchange information and consult each other.
- Fundamental rights refusal** ground to be applied to EU mutual recognition legal instruments.
- Provision on effective legal remedies** applicable to EU mutual recognition instruments.

2. Source: European Parliament Committee on Civil Liberties Justice and Home Affairs, 2014.

²⁴² An initial decision on a EAW was taken in 1999 during the Tampere European Council; that considered the need for a streamlined instrument for the transfer of persons fleeing prosecution or sentence, which complied with TEU Article 6 (European Council Presidency, 1999). Following the 2001 terror attacks of September 11th in the United States, the idea of an EAW gained further prominence and in December 2001 a political agreement on this was reached in the EU.

Directive on the European Investigation Order

Directive 2014/41/EU regarding the European Investigation Order in criminal matters (FD EIO) was adopted in 2014. It is the most recent of the mutual recognition instruments and was intended to streamline the way EU Member States obtain evidence from one another in cross-border criminal cases. It replaces a patchwork of mutual legal assistance measures, most notably the 2000 Mutual Legal Assistance Convention and FD 2008/978/JHA on the European Evidence Warrant (Publications Office, 2014a), and moves from a more flexible mutual legal assistance system to a stricter comprehensive approach (Heard and Mansell, 2011).

The proposal for an EIO was initiated by a group of EU Member States on 29 April 2010, with Belgium at the lead. In 2001, a European Commission Green Paper had proposed duty on Member States to admit unconditionally evidence gathered in other Member States (Ruggeri, 2014). However, this approach was discarded and the European Evidence Warrant proposal in 2003 did not include a requirement that Member States unconditionally admit evidence from other Member States. The European Commission presented a Green Paper on evidence gathering in 2009, which reinvigorated the debate about the admissibility of cross-border evidence (Ruggeri, 2014). The Stockholm Programme supported 'the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on principles of mutual recognition' (Council of Europe, 2010c, 39) as it was deemed that 'the existing instruments in this area constitute a fragmentary regime' (Council of Europe, 2010c, 39; Sayers, 2011). The Commission was tasked with creating a proposal on evidence gathering in cases with a cross-border dimension (Sayers, 2011) to ensure common standards (Peers, 2011). The admissibility of evidence presented challenges, since 'the rules of evidence law are tailored closely to the specific and widely varying systems of criminal procedure in different Member States', so if evidence was automatically admissible across borders, the protections offered for suspects by different legal systems might be circumvented (Peers, 2011, 739). Therefore, it was suggested in the Stockholm Programme that the Commission explore other means to facilitate admissibility of evidence (Peers, 2011, 739). The 2010 Action Plan Implementing the Stockholm Programme announced two legislative proposals initiated by the European Commission but Member States took the lead with their proposal in April 2010 and as such this overtook the legislative process on EIO.

The following paragraphs briefly describe the main Articles of the Directive. Their possible implications for the protection of fundamental rights are discussed in the section on the gaps and barriers pertaining to the mutual recognition instruments.²⁴³

Article 6 on the conditions for issuing and transmitting an EIO outlines that an EIO can only be issued if the following conditions are met:

- (a) 'the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and
- (b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.'

The executing authority can consult the issuing authority with regard to this and following this consultation can withdraw the EIO.

The cases justifying recourse to a different type of investigative measure are outlined in Article 10:

- '(a) The investigative measure in the EIO does not exist under the law of the executing Member State'.
- '(b) Would not be available in a similar domestic case' (Article 10(1)).

²⁴³ See also Vermeulen et al. (2011) for a comparison of how these provisions compare to other international instruments involving the transfer of persons.

The executing Member State's right to opt for another less intrusive instrument for investigations in cases where it allows comparable results to be achieved is again highlighted in Article 10(3).

Article 11 acknowledges *ne bis in idem*²⁴⁴ and the right of an executing Member State to refuse to execute any EIO that would contradict the principle. However, refusal to execute is not justified where the investigative order seeks to establish whether there is a conflict with the *ne bis in idem* principle or 'where the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same facts' (Recital 17). Article 11(1) lists eight grounds for non-recognition or non-execution, and reconfirms that the execution of an EIO can be refused if it's contrary to the principle of *ne bis in idem* (Article 11(1d)).

The EIO allows authorities in the issuing Member State to request the gathering and transfer of evidence to the executing Member State (Article 13). The EIO can also be requested by a suspect or accused individual or by their legal counsel in a criminal case (Article 1(3)). The EIO allows for: temporary transfer of a person in custody in the executing Member State in order to gather evidence (Article 22) and to obtain information on bank and other financial accounts of suspects (Article 26); covert investigations (Article 29); the interception of telecommunications (Article 30 and 31); and measures to preserve evidence (Recital 3 and Article 34).

The EIO, like the EAW, relies on the principle of mutual recognition and mutual trust. However, unlike the EAW it includes a proportionality test specifying that the order can only be issued if it is 'necessary and proportionate... taking into account the rights of the suspected or accused person' (Article 6(1)(a)).

The intended benefits of the EIO are that it would speed up and simplify the process of gathering evidence for criminal cases as well as reduce administrative costs. The Directive sets out deadlines for the acceptance of a request (within 30 days) and for the subsequent gathering and transfer of evidence to the issuing state (within 90 days of acceptance). The executing Member State must bear all the costs of evidence gathering and transfer (Publications Office, 2014a). Article 11 sets clear parameters for the grounds for non-recognition or non-execution of an EIO request, listing eight such grounds, including, for example, on grounds that 'the EIO would harm essential national security interests' (Article 11(1b)).

The EIO Directive was adopted in 2014 (transposition deadline 22 May 2017). As of August 2017, the EIO Directive is in force in 11 countries (Belgium, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands and the United Kingdom), the process is ongoing in several others (Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Greece, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and has not been transposed in Denmark, which has an opt-out for some domains in the area of Justice and Home Affairs (JHA) and Ireland, which have not opted in (European Judicial Network, 2017a).

- Instruments designed to improve the prisoner's situation in light of free movement

Framework Decision on Transfer of Prisoners

Framework Decision 2008/909/JHA on the application of the principle of mutual recognition of judgments imposing custodial sentences or measures involving deprivation of liberty (FD TOP) was adopted in November 2008. The FD introduced a mechanism to transfer a convicted person from a Member State where the sentence was given to a different state, typically that of his/her nationality or residence. The sentence would subsequently be served in the receiving (or executing) Member State.

²⁴⁴ See Recital 17, FD EIO: 'The principle of *ne bis in idem* is a fundamental principle of law in the Union, as recognised by the Charter and developed by the case-law of the Court of Justice of the European Union'.

Article 3 of the FD states that its objective is to facilitate and support social reintegration of convicted persons, building on recognition of the importance of family, professional and other ties, which the convicted person is presumed to have in the executing Member State (Ferraro, 2013). The FD takes into account the fact that impacts of imprisonment can be exacerbated by factors such as language and cultural barriers, and separation/distance from family and friends; these risks could be mitigated through the application of the FD (FRA 2016).

The following paragraphs briefly describe the main Articles of the FD. Their possible implications for the protection of fundamental rights are discussed in the section on the gaps and barriers pertaining to the mutual recognition instruments.²⁴⁵

Article 3 states that the FD only applies when the sentenced person is in the issuing or executing Member State and 'only to the recognition of judgments and the enforcement of sentences within the meaning of this' FD. Further, the FD does not modify 'the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6' of the TEU. Article 4 and 5 outline the criteria and procedure for forwarding a judgement and a certificate to another Member State. Article 6 of the FD addresses the issue of the sentenced person's opinion and notification and specifies situations in which the person's consent is not needed for the execution of the transfer, although individuals will have the option to state his or her opinion on the transfer.²⁴⁶

Further, Article 7 of the FD lists 32 offences for which the executing state does not need to establish double criminality, although Member States can opt out of this provision.

Article 8 addresses possible issues with sentence equivalence, i.e. situations where the original sentence meted out by the issuing state is not compatible with the laws of the executing state and provides for two possibilities of sentence adaptation. The executing state may adapt the sentence on the grounds of duration if the original sentence exceeds the executing state's maximum penalty for the offence in question. Second, if the incompatibility stems from the nature of the sentence, the executing state may adapt the sentence to a penalty provided for by its law for the offence in question.²⁴⁷

Article 17 of the FD governs the post-transfer sentence enforcement and specifies that relevant provisions, including early or conditional release, will be guided by the law of the executing state. The issuing state may request information on applicable provisions and has the option to withdraw the transfer certificate on the basis of information received. Conversely, the executing state can, but does not have to, take into consideration any relevant provisions existing in the law of the issuing state.²⁴⁸

The deadline for the transposition of the FD was in December 2011. Only five Member States (Denmark, Finland, Italy, Lithuania and the UK) met that deadline, but as of June 2017 all Member States, with the exception of Bulgaria, have completed the transposition process (European judicial Network, 2017c).

Framework Decision on Probation Measures and Alternative Sanctions

Framework Decision 2008/947/JHA on Probation Measures and Alternative Sanctions (FD PAS) was adopted in November 2008. The decision enables a convicted person to be transferred to a different

²⁴⁵ See also Vermeulen et al., (2011) for a comparison of how these provisions compare to other international instruments involving the transfer of persons.

²⁴⁶ Article 6(3). The opinion can be expressed both orally and in writing. Where applicable, due to the person's age or physical or mental condition, the opportunity to express an opinion can be afforded to a legal representative. Recital 5 of the FD expressly clarifies that the individual's 'involvement in the proceedings should no longer be dominant by requiring in all cases his or her consent'.

²⁴⁷ According to Article 8.3, the new adapted measure should correspond to the original one as closely as possible and the adaptation should not consist of a conversion into a pecuniary punishment.

²⁴⁸ Article 17(4).

Member State (typically, but not necessarily, the country of his/her nationality) and serve in that state a probation order or other alternative sanction imposed by the original issuing state. The rationale behind the framework decision is to facilitate rehabilitation, recognising the importance of existing 'family, linguistic, cultural and other ties' in this process, and to improve the monitoring of compliance with sanctions by convicted persons.²⁴⁹

Proper functioning of the FD PAS could convince sentencing judges that the defendant would be appropriately supervised in another Member State, thereby possibly encouraging judges to use non-custodial sentences. This is particularly important given the growing number of persons who are not nationals of the country in which they are sentenced (see box below) (EC, 2014c).

Non-citizens in EU prisons

According to 2015 SPACE statistics, 3 per cent of all inmate populations in the EU (including pretrial detainees)²⁵⁰ were citizens of another EU Member State. The unweighted average share of foreign EU citizens as a proportion of total prison population in each EU Member State was 6.8 per cent (median 4.6 per cent), although there was notable variation among Member States. The highest share was recorded in Luxembourg (42.2 per cent), followed by Austria (22.3 per cent) and Cyprus (18.8 per cent). By contrast, Hungary and Slovakia did not report any inmates holding the citizenship of other EU Member States.

Source: Aebi et al., 2017.

Article 4 outlines the types of probation measures and alternative sanctions that each Member State needs to be able to supervise, including for example: obligations of sentenced persons to inform authorities of changes to their residence or place of work, obligations to not enter certain places, to abide by restrictions on leaving the executing Member State, to avoid contact with specific persons, objects or to compensate for damage caused by the offence. For PAS, supervision and application are governed by the executing Member State's laws as stated in Article 13. Article 9 provides that the executing Member State 'may adapt measures when, because of their nature or their duration, they are incompatible with its national legislation' so long as it informs the issuing Member State's authority and ensures the adaptations correspond as closely as possible to those of the issuing Member State. Furthermore, the executing Member State's authority 'have jurisdiction to take all subsequent decisions relating to a suspended sentence, conditional release, conditional sentence and alternative sanction' (Article 14).

Article 6 states that a judgement or probation decision that is forwarded to another Member State authority must be accompanied by a certificate and Article 12 states the executing Member State must decide whether to recognise the judgment within 60 days of its receipt. Article 11 outlines grounds for refusing recognition and supervision of decisions, which include an incomplete certificate, if 'recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of *ne bis in idem*' or if 'the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed' according to the necessary requirements.

The intended added value of FD PAS in encouraging the use of alternative sanctions can in part be realised by the implementation of the FD ESO. If a person is already residing in a different Member State at the pretrial stage under an ESO is and compliant with its requirements, FD PAS may make an imposition of an alternative sanction a more attractive option for the sentencing judge (EC, 2014c). The intended added value of FD PAS in encouraging the use of alternative sanctions also stems from

²⁴⁹ Recital 8 of the FD. This rationale is similar to that behind the CoE's European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS 51).

²⁵⁰ SPACE statistics do not differentiate between EU and non-EU foreigners by stage of procedure. Two other limitations of the data for the purposes of this illustration should be mentioned. First, SPACE statistics are based on citizenship rather than residence. Second, data on EU foreigners are not available from five Member States (Belgium, Denmark, Greece, France and Malta), which account for at least 26 per cent of EU prison population.

a stipulation in the FD that Member States have to respect the judge's decision in the issuing state (even if alternative sanctions were not applicable to the offence in question in the executing state), thus the FD may lead to an approximation and further promotion of alternatives to custodial sanctions. The FRA (2016) argued that greater harmonisation of approaches to non-custodial sentences will reinforce the implementation of the FD and enhance mutual trust in the EU.

The deadline for transposition of the FD was December 2011. This was met only by two Member States (Denmark and Finland), but as of June 2017 all Member States, with the exception of Ireland and the UK, have completed the transposition process (European Judicial Network, 2017d).

In 2014, the Commission published an assessment of the implementation FD PAS (along with FD TOP and FD ESO) (EC, 2014c). Due to the delayed transposition, the assessment was based on a review of a limited number of sources and was preliminary in nature. The assessment found that a small number of Member States had not implemented all mandatory measures ensuring possible transfer of alternative sanctions and identified other issues that should be monitored in the ongoing implementation of the framework decisions. To facilitate the implementation of the FD, the Commission has supported the creation of several repositories of information and databases with relevant information and contacts.²⁵¹ Still more data are needed on the uptake and application of the FD (Tomkin et al., 2017).

Framework Decision on the European Supervision Order

Framework Decision 2009/829/JHA on the European Supervision Order (FD ESO) was adopted in November 2009. The FD enables pretrial supervision orders issued in one Member State to be carried out and enforced in another state. The intended added value of the ESO lies in addressing the fact that EU non-nationals are frequently considered high flight risk and are therefore more likely to be subject to PTD measures compared to those from the native population (Recital 5) (Morgenstern, 2014). In response, the ESO provides judges with an alternative to PTD that addresses concerns about absconding (EC, 2011d). The ESO allows for EU citizens to return to their home country to await the start of their trial (Recital 3). As such the 'home country supervises them using non-custodial (outside prison) measures. For example, asking them to report to a police station every day'. For instance, in the context of an EAW, the use of a ESO could mean that an execution of a warrant does not have to be followed by a lengthy period of PTD – and for this reason the CCBE has called for full use of ESO in EAW cases (CCBE, 2016a).

Interaction between the ESO and EAW is envisioned once an ESO is in place. While the ESO is built on the assumption that the defendant will appear in court voluntarily, Article 21 of the FD also provides for the surrender of the individual in accordance with FD EAW for trial or in the event of a breach of supervision measures.²⁵²

Any decision on supervision orders sent to another Member State is to be accompanied by a certificate as outlined in Article 10, which 'leaves a written record under conditions allowing the executing State to establish their authenticity'. Article 12 states that the home country of the suspect, upon receipt of the ESO, has 20 days to recognise the decision. As provided in Article 13, 'if the nature of the supervision measures is incompatible with the law of the executing State, the competent authority in that Member State may adapt them' to comply with the national law of that state and ensuring the measures correspond as closely as possible to those ordered by the issuing Member State. Some Member States will not recognise a decision wherein the crime the person is accused of is

²⁵¹ For example, the ISTEP project (EC, 2013a) ; the DOMICE project (EC, 2011b); the EU probation project (EC, 2011c).

²⁵² In this scenario, the executing state may not refuse the surrender of the person on the grounds typically afforded in EAW proceedings (Article 2(1) FD EAW), although Member States may opt out of this provision. In this context, according to Article 15(h) FD ESO, Member States have the right to refuse to recognize the decision on the supervision order in the first place if they had to refuse to surrender the person under EAW in the event of a breach of supervision measures.

not recognised as a crime under the national law of the home country or as provided by the grounds for non-recognition of decisions in Article 15 or due to administrative issues (for example incomplete certificates accompanying decisions can result in Member States not recognising them). However, Article 14 on double criminality outlines that Member States must recognise some decisions when they relate to, for example: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking of narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives' among other offences. Article 16 states that the law of the executing Member State will be used to govern the monitoring of the ESO. Furthermore, Article 18 provides that the executing Member State's authority 'shall have jurisdiction to take all subsequent decisions relating to a decision on supervision measures'.

In addition to minimising the use of PTD, the ESO is intended to bring value in situation where a suspected person is not detained pretrial, but is prohibited from leaving the country where the alleged offence took place (Fair Trials, 2012a). The added value of ESO is also potentially linked to its use in combination with FD PAS, in that compliance with supervision conditions under an ESO may make judges more likely to consider non-custodial options at the sentencing stage.

The FD ESO does not create a 'right' to the supervision order as an alternative to detention; use of the instrument is at the discretion of Member State authorities. However, in light of existing ECtHR case law on PTD as a measure of last resort (see cases *Ambruszkiewicz v Poland*; *Lelièvre v Belgium*) observers have argued that national courts have the obligation to at least consider the use of the ESO (Fair Trials, 2012a). Similarly, the Commission's Green Paper on detention stressed that in the pretrial phase judges are required to apply the most lenient coercive measure that is sufficient to address the risk of absconding and reoffending (EC, 2011d).

The FD lays out six minimum types of supervision measures that Member States are obliged to provide, although additional types of supervision and monitoring measures may also fall under the FD.²⁵³

The deadline for the transposition of FD ESO was December 2012. This was met by only four Member States (Denmark, Finland, Latvia and Poland), but as of June 2017 all Member States except Ireland had completed the implementation process (European Judicial Network, 2017e).

The Commission's 2014 preliminary implementation assessment noted that one Member State (Hungary) had not adopted provisions for all six mandatory supervision measures (it was ready to accept only three of them) (EC, 2014c). Three Member States (Hungary, Latvia and Poland) had not implemented the FD's Article 21, which allows the issuing state to use the EAW to summon the individual for trial or in the event of non-compliance with supervision conditions (EC, 2014c). In a 2016 survey of Confederation of European Probation (CEP) delegations, most countries reported having introduced 'specific administrative, judicial, or other structures or arrangements' for the management of transfers under FD ESO and FD PAS (CEP, 2015).

II – Gaps and barriers in fundamental rights in relation to the mutual recognition instruments

Having described the five instruments, this section presents findings from the literature review and interviews about the current state of play and the corresponding gaps and barriers in European cooperation and action arising from the use of the instruments. The issues that are cross-cutting (applying to several instruments) are described first, then those that are specific to only one instrument. It is appreciated that there is an important distinction between the EAW and EIO

²⁵³ Article 8 FD ESO. However, with respect to measures other than the six mandatory items, Member States need to make a one-off decision whether they accept them (rather than make a decision on an ad hoc basis in each individual case).

(designed to facilitate cross-border prosecution) and the other instruments (designed to address the prisoners' situation in light of free movement and non-discrimination). We are careful to specify the instrument referred to in relation to each gap.

- **Limited ability to refuse execution on fundamental rights grounds in all but the EIO**

A gap in the instruments is that only the EIO explicitly provides for refusal of its execution on fundamental rights grounds.²⁵⁴ Fundamental rights considerations are highly relevant for all five mutual recognition instruments; all five FDs contain explicit reference to Article 6 TEU and their Recitals include references to fundamental rights.²⁵⁵

The European Added Value Assessment (EAVA 6/2013) on revising the EAW noted that 'there is a tension between the objectives of achieving effective judicial cooperation and ensuring adequate human rights protection' (Del Monte, 2014). For example, concerns about whether individuals surrendered under an EAW will receive a fair trial, the right to liberty, the presumption of innocence, the principles of *nulla poena sine lege* (no punishment without law), or the prohibition of cruel, inhuman and degrading treatment (ill-treatment) have been voiced.

In relation to the EAW, this gap has been somewhat mitigated by national legislation, national court decisions, ECtHR and the CJEU case law. In relation to the EAW, some Member States have included in their national legislation the ability to refuse to execute a warrant on fundamental rights grounds (Germany, Italy, UK, Greece and Finland have done this) (Tomkin et al., 2017). National courts and judges have refused the execution of a warrant for surrender due to concerns about 'exposing an individual to cruel, inhuman or degrading treatment (ill-treatment) following surrender, in violation of the principle of non-refoulement prescribed by Article 3 of the ECHR and Article 4 of the Charter of Fundamental Rights of the EU' (Tomkin et al., 2017, 12). While these court decisions and national legislation protect the fundamental rights of suspects, it shows a breakdown of trust and mutual recognition. To this extent, variable standards of detention conditions can be seen as a barrier to the use of the EAW (Niblock and Oehmichen, 2017).

Turning to decisions of the ECtHR and CJEU, neither have included an explicit right to be (or not to be) transferred under the mutual recognition instruments, but case law (primarily in connection with the EAW) has established that Member States have certain obligations when making decisions about transfers.²⁵⁶ This has recently been confirmed by the *Aranyosi* ruling (see box below), which affirmed fundamental rights concerns as a reason to stop the execution of mutual recognition instruments. The judgment of the CJEU in *Aranyosi* has been positively received by legal practitioners and experts (Van Ballegooij and Bárd, 2016, Fair Trials, 2016b), who welcomed the ability to consider the fundamental rights of the accused. In the decision the CJEU seems to confirm a recent tendency²⁵⁷ to ensure 'at least some protection for human rights within the EAW system' (Peers, 2016b).

²⁵⁴ This situation reflects a general assumption prevailing at the time of the drafting of the documents that Member States comply with their fundamental rights obligations (Bovend'Eerd, 2016). Two other explanations for the omission of systematic refusal provisions on the basis of fundamental rights were put forward at a conference organised in the framework of the study by Tomkin et al. 2017). The first was the existence of measures designed to approximate the rights of suspected and accused people at the EU level. The second explanation was the fact that Member States may not be in a position to assess the situation in other Member States.

²⁵⁵ These Articles are the following: for EAW (Article 1(3)), for TOP (Article 3(4)), for PAS (Article 1(4)), for ESO (Article 5) and for EIO (Article 1(4)).

²⁵⁶ FRA 2016. Primarily, these obligations revolve around, but are not limited to, the following fundamental rights: 1) the right to fair trial; 2) the right to respect for family and private life; and 3) freedom from torture and inhumane and degrading treatment.

²⁵⁷ Before *Aranyosi and Căldăraru* the CJEU had ruled that the limits on the length of detention in extradition cases set by the ECtHR applied to cases where a fugitive was kept in detention in the executing Member States where he or she had contested the EAW.

The cases of *Aranyosi and Căldăraru*

The joint *Aranyosi and Căldăraru* judgement of 5 April 2016 is highly significant because it confirmed that fundamental rights violations can be a valid reason for delay or even suspension of the implementation of an EAW, following concerns of the executing judge about inadequate prison conditions in the issuing state.

The question referred to the CJEU in these cases was ‘must FD EAW Article 1(3) be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom a European arrest warrant is issued?’

In this case the CJEU stated that the presumption of mutual trust is the basis on which the AFSJ is built, but that it is rebuttable – mutual trust in the FD EAW is not unconditional. If a Member State executing an EAW has evidence that there is a real risk that detention conditions in the issuing Member State infringe Article 4 of the CFREU (i.e. Prohibition of torture and inhuman or degrading treatment or punishment), the national authority in the executing Member State must apply a two-step test to assess whether or not the execution would lead to a violation of fundamental rights of the accused:

First, an assessment of general detention conditions in the issuing Member State.

Second, an assessment of whether there are substantial grounds for believing that there is a real risk of violation of Article 4 of the CFREU in relation to the person in question.

The specific factors and scope of the duties to verify imposed on Member States are outlined in the following paragraphs of the joint *Aranyosi and Căldăraru* judgement:

- Paragraph 89 outlines that an executing authority must ‘rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention’ as well as the places wherein this information may be obtained.
- Paragraph 90 outlines that the state within which an individual is detained has an obligation to ensure detention conditions respectful of dignity, which do not cause excessive distress or suffering and ensure the health and well-being of the prisoner, as ‘follows from the case-law of the ECtHR that Article 3 ECHR imposes’.
- Paragraph 95 outlines that as a matter of urgency the issuing state must provide all necessary information regarding the detention conditions to the executing state.
- Paragraph 97 outlines the right of the executing authority to set a deadline for the receipt of such information and the conditions for fixing this deadline.

If the judicial authority finds that there exists a ‘real risk of inhuman or degrading treatment’, the execution of the EAW should be postponed until the executing judge or courts have been provided with evidence of this in the form of supplementary information.

Following the decision, judicial authorities in some Member States have referred to the case and refused to execute the EAW. In Germany, for example, the Higher Regional Court in Bremen referred to the *Aranyosi* decision in refusing a surrender to Latvia. Similarly, the Higher Regional Court in Munich refused a request to surrender the individual in question to Bulgaria. In the Netherlands, a Court in Amsterdam specifically referenced the decision in *Aranyosi and Căldăraru* and refused to execute the warrant from Romania as it had not received the information on prison conditions and the real risk to inhuman treatment on surrender within the specified time.

The scope of application of the *Aranyosi* decision is not yet clear²⁵⁸ and the ruling raises practical questions (for example, how should courts find out about conditions in another Member State? What standards should be accepted by the executing court?), as well as questions about the principle of mutual trust and recognition.

The European Commission has taken some follow-up actions after the *Aranyosi* judgement. A roundtable on

²⁵⁸ The main question relates to the scope of application of this ruling, namely whether the test should also be applied to cases where there is a risk of violation of fundamental rights that, in contrast to those protected by Article 4, are not considered absolute, and whether it applies to other cooperation mechanisms based on mutual adopted in the AFSJ that also foresee the obligation laid down by Article 1(3) of the FD EAW. From a practical point of view, while the CJEU mentions some of the sources that can be used in the assessment of detention conditions and the risk of violation of fundamental rights, it does not clarify whether the executing authority is obliged to look into the general detention conditions on its own motion (Bovend'Eerd, 2016).

detention in the EU was held in October 2016 with the aim of consulting experts on the consequences of the judgment and on the impact of the standard of detention conditions on the operation of EU mutual recognition instruments. In an interview conducted for this Cost of Non-Europe study, a representative reported that the European Commission is developing common metrics to be used in response to information requests under Article 15(2) for the FD EAW. Another relevant development is a one-stop-shop database on detention conditions in the Member States in cooperation with the FRA and the CoE. In this latter project, the FRA, based on findings from their own 2016 report and a request from the EC, has initiated a project intended to 'draw together available monitoring data and information in close cooperation with the relevant monitoring bodies'. The project also aims to:

- 'Develop a concept for accessible and EU specific data and information on detention conditions'.
- 'Develop a harmonised approach to checking and assessing fundamental rights concerns in individual cases by judges, prison and probation officials, or ministry civil servants'.
- 'Elaborate recommendations for a solid monitoring system connected to best practices and incentives for change'

Source: Tomkin et al., 2017, FRA, 2016c, Bovend'Eerd, 2016, Gáspár-Szilágyi, 2016, EC, 2016a, Hanseatisches Oberlandesgericht, 2016, Oberlandesgericht München, 2015, Rechtbank Amsterdam, 2017, *Aranyosi and Căldăraru* judgement

The most recent mutual recognition instrument, the EIO, is the only one that includes refusal to execute on fundamental rights grounds. In addition to the EIO's 'provision allowing executing authorities to refuse the execution of the EIO on fundamental rights grounds' (Armada, 2015, 8), there are also so-called 'hidden' grounds for refusal – those that are not explicitly expressed in the grounds for refusal, but look like they could be the basis for refusal. Article 10 of the EIO Directive considers instances where the executing authority may have recourse to an alternative type of investigative measure other than the EIO, specifically 'where the investigative measure selected by the executing authority would achieve the same result by less intrusive means than the investigative measure indicated in the EIO'. It has been suggested that this asks the executing to conduct a proportionality test (Mangiaracina, 2014), 'assessing the intrusiveness of the measure requested and looking at other measures at its disposal with different degrees of intrusiveness' (Heard and Mansell, 2011, 6). Heard and Mansell note that 'this is a positive move, though it introduces a degree of complexity into a regime intended to add simplicity to cross-border evidence requests' (Heard and Mansell, 2011, 6).

- **Assessments of detention conditions needed for the EAW and TOP are rarely conducted and are difficult in practice**

As discussed in the previous section, while only the EIO includes explicit fundamental rights grounds for refusal, ECtHR and CJEU jurisprudence is clear that Member States cannot transfer a person to a country where his/her fundamental rights may be at risk, particularly from the perspective of the freedom from inhuman and degrading treatment and of their right to dignity. In practical terms, this requires courts to assess whether the detention conditions applicable to the individual in the executing Member State violate these rights. In practice, this can be extremely challenging. As mentioned in the box above, one of the uncertainties following the *Aranyosi* case is how courts should go about doing this. In a survey of legal professionals in 2011 about the functioning of TOP, less than a third of respondents felt information on material detention conditions in the executing state was available and approximately a fifth of interviews did not view it as important to have available information on detention conditions in the executing state or on the individual's home circumstances (Vermeulen et al., 2011). Although these findings are now six years old, they still appear to be relevant. In 2016, the FRA reported (in relation to the EAW) that there is often little to no further inquiry by executing authorities to see whether guarantees made by an issuing authority (for example regarding detention conditions in their state or respect for fundamental rights) have actually been realised in practice.

While *Aranyosi* confirms that Member States should consider whether detention conditions breach fundamental rights when making decisions about EAW, the case leaves open questions about *how* judges should find out about detention conditions.

- Underuse of the ESO and PAS

There is a perception that the ESO and PAS are underused. Since the use of these instruments may put some suspects or prisoners in a better position (as a result of serving their sentence at home, in the community rather than custody or avoiding detention all together) underuse could have important implications for fundamental rights, given the potential threats to fundamental rights stemming from spending time in prison (Tomkin et al., 2017).

While firm data on the scale of the uptake of the ESO is not available, its application appears to be rare (Tomkin et al., 2017). In a 2016 survey run by CEP, only Romania reported having commenced and/or completed transfers under the FD²⁵⁹ and no country was in a position to identify best practices. Similarly, in a survey of defence practitioners on the implementation of EAW run by the CCBE, the vast majority of respondents were unable to report on any ESO transfers.²⁶⁰ As to the barriers leading to the ‘gap’ of underuse of the ESO, the following may contribute:

The operation of the ESO requires high levels of mutual trust, but this is lacking in practice and this means that national judges, who hold discretion over whether to use the instrument, are seemingly reluctant to yield control of the defendant (Min, 2015).

Relevant stakeholders (judges, prosecutors) may not be aware of the instrument (Tomkin et al., 2017) and may not have the necessary skills in common languages – delays can be caused by the low quality of required translations of required documents (CEP., 2016).

The process can be laborious and costly (CEP., 2016).

Misaligned incentives may also play a role in ESO’s low rates of utilisation. Prosecutors are primarily interested in seeing the investigation through and may be reluctant to release the defendant from their territory, e.g. for fear this creates obstacles for further questioning (Tomkin et al., 2017).

Cultural factors, such as relatively weak respect for the presumption of innocence and public preference for PTD in the interest of social protection (as opposed to social rehabilitation) were also suggested as possible contributing factors (Tomkin et al., 2017).

Example of ESO use in the UK

In 2015, the first ESO was applied in the UK in a case that involved an individual returning to Spain to be monitored by the Spanish authorities, pending trial in the UK. Two separate applications were given to the Crown Court in the UK involving young men aged between 19–30, with no previous convictions, no ties in the UK, one having a source of employment, and the other being a full-time student. Both cases involved allegations of a serious nature, the first of sexual assault and the second of rape. In both cases the court identified that notwithstanding the seriousness of the nature, both accused were good candidates for bail and were it not for the fact that they were non-nationals of the UK, they would have been granted bail.

In the cases of both applications, neither the judge nor the prosecution were aware of the FD ESO, and, from the outset, the case was adjourned to allow consideration of the FD and to better understand the implications. In particular the judges in both cases were concerned that the instrument be used in the right way, in the absence of specific procedural guidelines beyond the FD itself. The process took approximately 6–8 weeks, during which time the individual was held in custody. However, in the second case, the accused was granted bail in the UK pending a decision on the ESO. This initial bail application was made arising from the previous lengthy procedural delays experienced during the course of the first ESO application.

Source: Tomkin et al., 2017.

As with FD ESO, firm data on the use of the PAS is limited, but the instrument appears underutilised by Member States. In the 2016 CEP survey, mentioned above, only Latvia, Luxembourg and Romania reported having commenced and/or completed transfers under the FD. Some explanations for this

²⁵⁹ No data were available from Austria.

²⁶⁰ All but two respondents who explicitly commenting on the uptake of ESO as part of EAW proceedings either positively stated that no ESO transfers had taken place in their country or that they were not aware of any transfers having taken place. In the two remaining cases, the Finnish respondent stated there was ‘very little, if any, experience’ in Finland regarding the ESO and the UK respondent noted ESOs had ‘barely been used’ (CCBE, 2016a).

have been identified in existing literature. Possible barriers, some of which are very similar to those identified for FD PAS, are as follows:

The use of FD PAS seems hampered by the lack of awareness of the possibility of its use on the part of relevant authorities (Tomkin et al., 2017).

Lack of data on use and dearth of evaluation of the functioning of the FD were also suggested as contributing factors (Tomkin et al., 2017).

Lack of skills in common languages on the part of relevant practitioners (CEP., 2016).

Delays in and poor quality of translations (CEP., 2016).

A perception that the process of using PAS is bureaucratic (CEP., 2016).

Lack of detail in the text of the FD itself, necessitating the consultation of other sources for its execution (CEP., 2016).

- Consent to a transfer is not always needed or is implied

A potential gap that could infringe rights is that the instruments do not require the explicit consent and agreement of the suspect or prisoner concerned to all forms of transfer. The arrangements regarding consent in the three FDs are summarised in Table 2, organised by the various circumstances of the transfer in question. FRA (2016) reported that the majority of Member States have established procedures, either in law or in practice, to obtain consent or opinion of the person concerned under FD TOP, and only five have done so for PAS and three for ESO. Further, ten Member States have introduced procedures for revoking consent and eleven for changing opinion for TOP transfers, five states allow the revocation of consent for PAS transfers and four for ESO transfers.

■ Table 2. Consent arrangements in FD TOP, FD PAS and FD ESO

Destination EU Member State	Framework Decision on Transfer of Prisoners (FD TOP)	Framework Decision on Probation Measures and Alternative Sanctions (FD PAS)	Framework Decision on the European Supervision Order (FD ESO)
To the Member States of nationality and residence	Consent not required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	Informed consent required
To the Member States of lawful and usual residence	Consent required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	Informed consent required
To the Member States of nationality but not of usual residence	Consent required Opportunity to state opinion	Upon request (condition of the consent of that Member States)	Upon request (condition of the consent of that Member States)
To the Member States of nationality but not of usual residence, where the person will be deported	Consent not required Opportunity to state opinion	Consent not required (condition of actual return or willingness to return)	The Framework Decision is silent on this issue
To the Member States to which the person fled or returned	Consent not required Opportunity to state an opinion	Consent not required (condition of actual return or willingness to return)	Upon request (condition of the consent of that Member States)
Other Member States	Consent required Opportunity to state an opinion (condition of the consent of that Member States)	Upon request (condition of the consent of that Member States)	Upon request (condition of the consent of that Member States)

Source: FRA, 2016a.

- **Procedures to ensure information, understanding and translation regarding transfer of persons are not specified in FD TOP, ESO and PAS**

As suggested by the fact that rights to information and translation are protected explicitly in two Directives²⁶¹, there is a gap in the mutual recognition instruments if there are not clear procedures to ensure that people know of the option to be transferred under FD TOP, ESO and PAS. The text of the FDs is silent on this topic.

Research by the FRA (2016) indicates that the majority of Member States have a procedure in place to inform sentenced persons about the option to transfer under FD TOP, although, as of 2015, this was still missing in nine Member States. Procedures to inform sentenced persons about their options under FD PAS were found by the FRA to be even rarer across Member States, leaving eligible individuals dependent on other sources of information, such as lawyers, relevant websites and the word of mouth.

A related issue is ensuring that affected individuals understand the language in which relevant documentation is drawn up and information provided. FD TOP requires information about a transfer decision to be provided in a language the person understands (though not necessarily his/her native language), but no such provision exists in FD ESO and FD PAS. All three FDs require the transfer certificate to be translated to an official language of the executing state. FRA's analysis (2016) indicated that 16 states offered interpretation assistance in connection with FD TOP transfers²⁶² and fewer than half of Member States offered assistance for ESO and PAS transfers.

Ensuring the person concerned understands their options and rights is important for the protection of fundamental rights, particularly since in some instances the consent of the transferee is either not required (most modalities of FD TOP) or implied (most modalities of FD PAS). Accordingly, the FRA found that at least six Member States have processes in place to verify that individuals fully understand the transfer procedure under FD TOP and three Member States verify people's understanding in PAS and ESO proceedings (FRA 2016).

- **Legal assistance and legal aid is not specified in FD TOP, PAS or ESO**

The three FDs do not include any provisions on access to lawyer and on legal aid, leaving the question to national legislation.²⁶³ With respect to FD TOP, nine Member States introduced the right to legal counsel in their implementing laws, with eight of them including provisions for legal aid. In addition, legal assistance and legal aid are covered by general provisions applicable to transfer cases in at least 14 Member States. Similarly, general provisions on legal assistance cover FD PAS transfers in 12 Member States and FD ESO transfers in at least 13 states. A much smaller number of Member States explicitly incorporated legal assistance to their implementing legislation: two Member States for FD PAS and one state for FD ESO. However, only eight Member States have provisions for interpretation of communication with legal counsel if needed (FRA 2016).²⁶⁴

²⁶¹ In the context criminal proceedings that may involve an ESO, the provisions of the Roadmap Directive on translation and interpretation may possibly be drawn on – this is discussed in Chapter 3.

²⁶² At the time of the writing of the FRA report Ireland, not counted among the 16 countries, had not implemented FD TOP yet. However, sentenced individuals who were eligible for transfer had access to interpretation assistance.

²⁶³ In the context criminal proceedings that may involve an ESO, the provisions of the Roadmap Directives on access to a lawyer and on legal aid may be drawn on. For a detailed discussion of gaps associated with the implementation of the Directive, see Chapter 3.

²⁶⁴ Executing Member States can also grant the right to legal assistance after a transfer has occurred. That is the case for 22 Member States for TOP transfer, 17 states for PAS transfers and 14 states for ESO transfers.

- **Rights to appeal transfers are not included in any of the FDs**

Another gap is that the FDs do not contain any provisions on appealing transfer-related decisions and no such rights are granted in the majority of Member States. The possibility to appeal decisions made in the issuing state exists in 11 Member States for TOP²⁶⁵ and six states for PAS. ESO transfer should occur only with the person's consent or on request, removing the need for an appeal procedure.

In relation to the EAW, researchers have noted differences in the legal remedies available at Member State level, with some having extensive rights of appeal while others have close to none (Del Monte, 2014, 17). This is due to the way in which the notion of the EAW as a 'judicial decision' is interpreted in different Member States and, as a result, can lead to divergent national legal guarantees and recourses (Weyembergh, 2014, 14). While some Member States, such as France and Germany, have introduced national rights of appeal, the lack of coherence greatly undermines the mutual recognition bedrock of the EAW (Weyembergh, 2014).

Concerns about limited compensation for unjustified detention and limited possibilities of appeal were most recently raised in relation to the EAW by the CCBE and European Lawyers Foundation (CCBE, 2016a).

- **Proportionality in the use of the EAW and EIO**

Concerns have been raised about the use (perhaps even the systematic use) of the EAW in minor cases where it is not the most appropriate instrument and/or in cases that are not trial ready (Del Monte, 2014). Aiming to address disproportionate use, the CoE has published a handbook on the EAW (in 2008, amended in 2010) providing guidance on how and when to issue EAWs and suggesting alternatives in cases where the EAW may not be the proportionate instrument (Council of the European Union, 2010). However, disproportionate use was noted recently in a 2016 report in the EAW by the CCBE and the European Lawyers Foundation (CCBE, 2016a). This report also noted instances of multiple requests for EAWs for the same person, and threats to fundamental rights in cases where the Schengen Information System (SIS) database was not updated once a decision had been made by a Member State that a person would not be surrendered under an EAW, resulting in the person being detained when the EAW was no longer outstanding.

Lack of updates to SIS about EAWs

A 2016 report by CCBE and European Lawyers Foundation draws attention to concern about SIS alerts, which remain active despite an executing state refusing to surrender the person for whom an EAW, for example, has been issued.

The report suggests that 'an EU-wide scheme to remove active SIS alerts once an executing state has refused to surrender a requested person' ought to be considered, which 'would be equivalent to following the principle of *ne bis in idem*, and would support the principles of mutual recognition and legal certainty'.

This problem persists according to the CCBE noting that 'cases continue to be reported about subjects of an EAW being detained because a SIS alert remains active despite a Member State having already refused to execute an EAW request in respect of that person'.

Source: CCBE, 2016a.

In relation to the EIO, before the Directive was passed, Fair Trials (Heard and Mansell, 2011), the FRA (FRA, 2011) and academic commentators (Sayers, 2011, Armada, 2015) raised concerns about the potentially disproportionate use of intrusive investigatory techniques that could infringe rights to privacy and family life. Article 3 outlines the scope of the EIO and notes that it 'covers any investigative measure with the exception of the setting up of a joint investigation team and the gathering of evidence within such a team'. The Directive allows, for the purpose of building a case, home searches, blood testing or wiretapping (Article 30)(Armada, 2015). Writing since the EIO was

²⁶⁵ The need for appeal provisions is not necessary in states that require a tripartite consent to the transfer.

adopted, some commentators have noted concern about this giving possible rise to inappropriate or disproportionate use (Armada, 2015). However, commentators (Capitani and Peers, 2014) also note that the Directive includes fundamental rights protections, pointing out that such provisions were argued for by the EP during the negotiation. The Directive includes a consultation procedure between competent authorities (Article 6(3) and 13(4)), a (limited) double criminality requirement (Article 11(1)(d)), an ‘unavailable in a similar domestic case’ ground for refusal (Article 6(1)(b)) and a possibility to resort to a less intrusive investigative technique (Article 10(3)) (Armada, 2015). A transposition and implementation assessment, not yet available, is needed to understand whether and how these protections have been put into national law, and whether judges and the police are using them as intended.

- **The cost of EAWs**

The EAW has been criticised for being inefficient and costly, with a large number of the EAWs issued not being executed (Del Monte, 2014). One contributing factor is use of the EAW for minor offences for which alternatives may exist. Despite a majority of issued EAWs not being executed, they still generate considerable costs. A judge of the High Court of Ireland has spoken of the ‘unjustified burden on public funds [that] arises for both executing and issuing state’ (Del Monte, 2014, 17).

- **Specific concerns relating to the FD TOP**

Inconsistent consideration of factors contributing to social rehabilitation. According to the FRA, all states that have implemented the FD include in their relevant legislation a reference to the objective of social rehabilitation, although Member States consider a variety of different factors (FRA, 2016a). At least 22 Member States examine family and social ties, 12 take into consideration humanitarian concerns and 10 examine detention conditions. However, the FRA concluded that many Member States take a narrow view of social rehabilitation, assuming that a transfer to a person’s home country will always facilitate the individual’s re-entry to society (FRA, 2016a). This is in line with earlier findings by Vermeulen et al; one-third of practitioners interviewed for Vermeulen’s study did not see the need to consider a prisoner’s prospects for rehabilitation on a case-by-case basis (rather, they assumed that the home state would be the best option) (Vermeulen et al., 2011). As the FRA pointed out, this is not consistent with the objectives of the FD, which requires cases to be assessed on an individual basis and transfers to be refused if it is concluded that it would not facilitate the offender’s rehabilitation. Put differently, the FD TOP should not be used primarily as a vehicle to deport people.²⁶⁶

In Vermeulen’s study, nearly half of respondents (43 per cent) indicated that information was not always readily available to make an assessment of an individual’s social rehabilitation prospects. Specifically, less than a fourth of respondents felt this way with respect to information on the prisoner’s home state circumstances and the education, training and work opportunities in that country’s prison system.

Risks of a de facto deterioration of a prisoner’s situation. Related to considerations surrounding social rehabilitation is the risk that a person is transferred (under FD TOP, PAS or ESO) to a state with a more stringent sentence execution regime. While the mutual recognition principle generally requires Member States to respect other states’ decisions, all three FDs allow the executing state (under certain circumstances) to adapt the judgment or measure in question before the transfer takes place, provided it does not result in a more severe punishment. However, in the context of FD TOP, Vermeulen et al. noted that it remained unclear on what basis competent authorities will assess whether this principle has been adhered to (Vermeulen et al., 2011). The same study also stressed that,

²⁶⁶ For instance, the UNODC Handbook on prisoners with special needs, which includes a chapter on foreign nationals, makes a clear distinction between transfers and deportations. Transfers aim to assist the social reintegration of imprisoned individuals, while deportations represent punitive measures (UNODC, 2009).

even where there is no need for an adaptation, the FD did not address the possibility that a person is transferred to a state with more stringent sentence execution regime. In such cases, while the sentence would nominally remain equivalent, the transfer would de facto result in a deterioration of the prisoner's situation.

Not all Member States include specific measures to protect vulnerable persons. Detention conditions may be particularly important with respect to vulnerable individuals with specific needs. FD TOP includes provisions that permit refusing a transfer if there is insufficient capacity to accommodate the needs of a transferee, but according to the FRA, a very small number of Member States incorporated provisions to protect the rights of vulnerable persons, although some states introduced alternatives to detention as one option to address vulnerability concerns. Again, this is a barrier stemming from limited transposition of the FD into national law (FRA, 2016a).

Lack of understanding and knowledge of the FD TOP among practitioners. The implementation of the FD appears to be hampered by relative lack of familiarity with the instrument on the part of practitioners and their limited access to information that is necessary for making decisions about transfers, which are barriers to proper functioning. The majority of respondents (65 per cent) to the survey by Vermeulen provided an incorrect answer on whether a transfer can be authorised when provided with a case study scenario.

III – Chapter summary and key findings

This chapter looked at five mutual recognition instruments adopted by the EU relevant for the focus of this study: Framework Decision on the European Arrest Warrant (FD EAW); Framework Decision on Transfer of Prisoners (FD TOP); Framework Decision on Probation Measures and Alternative Sanctions (FD PAS); Framework Decision on the European Supervision Order (FD ESO); and Directive regarding the European Investigation Order (EIO). As well as describing these measures, this chapter identified ways in which their use in practice has been shown to, or may possibly, infringe procedural and/or fundamental rights. The following key gaps were identified:

- MR 1. Limited ability to refuse execution on fundamental rights grounds in all but the EIO.
- MR 2. Assessments of detention conditions needed for the EAW and TOP are rarely conducted and difficult in practice.
- MR 3. Under-use of the instruments (ESO, PAS).
- MR 4. Consent to a transfer is not always needed or is implied.
- MR 5. Procedures to ensure information, understanding and translation regarding transfer of persons are not specified in FD TOP, ESO and PAS.
- MR 6. Rights to appeal transfers are not included in any of the FDs.
- MR 7. Concerns about potential disproportionality in the use of the EAW and EIO in minor cases.
- MR 8. Cost of EAWs to Member States.
- MR 9. Inconsistent consideration of factors contributing to social rehabilitation in relation to FD TOP.
- MR 10. Risks of a de-facto deterioration of prisoner's situation in relation to FD TOP.
- MR 11. Not all Member States include specific measures to protect vulnerable persons in relation to FD TOP.
- MR 12. Lack of understanding and knowledge of the FD TOP among practitioners.

Possible barriers or causes of these issues were suggested; primarily the lack of knowledge of the instruments among legal professionals and bureaucracy and delays when the instruments are used.

Chapter 3 State of play, gaps and barriers relating to the measures contained in the 2009 Roadmap

This chapter addresses the first research question (What is the current state of play and the corresponding gaps and barriers in European cooperation and action in the area of procedural rights) in relation to the six procedural rights Directives.

The chapter is divided into eleven sections. The first introduces the Directives and the 2009 Roadmap. There then follows seven sections that look at each of the measures (first describing them then presenting findings from the literature review and interviews as to the gaps and barriers). The ninth section presents findings as to the barriers to full implementation and realisation of the rights protected in the Directives (i.e. the reasons for the gaps). The tenth section looks at the coherence of the six Directives. The final section looks at the measures outlined in the Roadmap not yet subject to EU legislation.

I – Background to the Directives

The 1999 Tampere European Council and the 2004 Hague Programme recognised that for the further realisation of mutual recognition, EU measures to protect procedural rights in criminal proceedings were needed. In 2009 (after the failure to adopt a draft FD), the CoE adopted a resolution on a ‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’. In the Roadmap, which formed part of the Stockholm Programme, the Council invited the Commission to submit specific proposals for strengthening procedural rights of suspected or accused persons in criminal proceedings. The 2009 Roadmap envisaged six measures:

- **Measure A: Translation and interpretation.** This measure should ensure that suspected or accused person who does not speak or understand the language that is used in the proceedings are provided with an interpreter and translation of essential procedural documents.
- **Measure B: Information on rights and information about the charges.** This measure should ensure that suspected or accused of a crime get information on basic rights and receive information about the accusation and all the information necessary for the preparation of a defence.
- **Measure C: Legal advice and legal aid.** This measure should ensure effective access to legal advice that legal advice through a legal counsel.
- **Measure D: Communication with relatives, employers and consular authorities.** This measure should guarantee that a suspected or accused person who is deprived of liberty is promptly informed of the right to have at least one person informed of the deprivation of liberty.
- **Measure E: Special safeguards for suspected or accused persons who are vulnerable.** This measure should guarantee that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.
- **Measure F: A Green paper on pretrial detention.** Excessively long periods of PTD are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands.

In response to the 2009 Roadmap on procedural rights, a set of measures has been adopted:

- Directive 2010/64/EU on the **right to interpretation and translation** in criminal proceedings.
- Directive 2012/13/EU on the **right to information** in criminal proceedings.
- Directive 2013/48/EU on the **right of access to a lawyer** in criminal proceedings and on the right to communicate upon arrest.
- Directive 2016/343/EU on **the presumption of innocence** and the **right to be present at trial** in criminal proceedings.
- Directive 2016/800/EU on **procedural safeguards for children** who are suspects or accused persons in criminal proceedings.
- Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.
- Directive 2016/1919/EU and Commission Recommendation on **legal aid** for suspects or accused persons in criminal proceedings.

- **The temporal scope of the Directives**

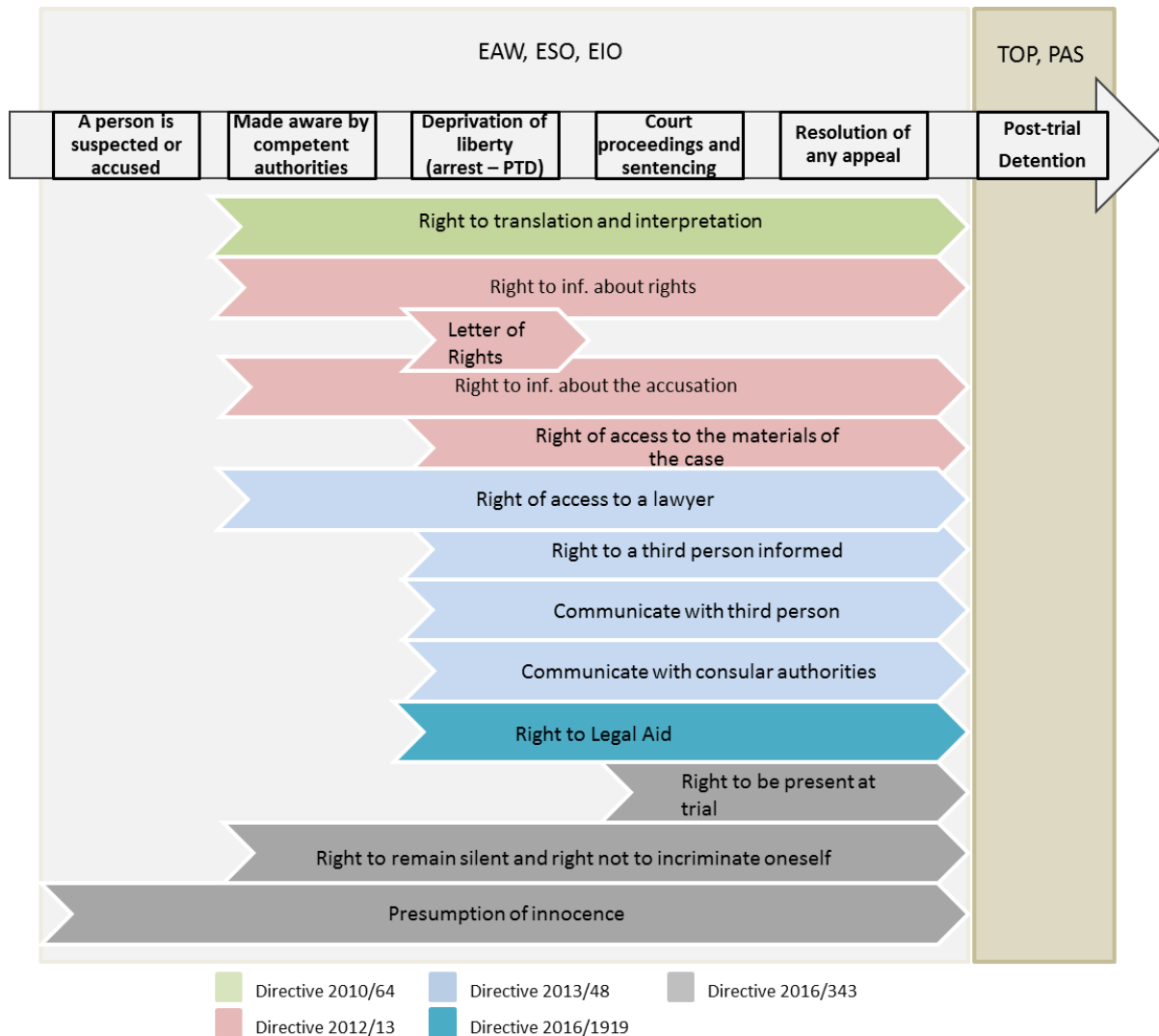
As illustrated in the figure below, these Directives apply at various stages of an individual's involvement with the criminal justice system.

The Directives on translation and interpretation (Article 1(2)), access to information (Article 2(1)) and access to a lawyer (Article 2(1)) cover the same general scope and apply to persons from the time that they are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence (including, where applicable, sentencing and the resolution of any appeal).

Directive 2012/13 also states that Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights (Article 4), and where a person is arrested and detained at any stage of the criminal proceedings, he or she has the right of access to the materials of the case (Article 7). Directive 2013/48 also states that suspects or accused persons who are deprived of liberty have the right to have a third person informed (Article 5(1)), the right to communicate with third persons (Article 6(1)), and in the case of non-nationals have the right to have the consular authorities of their State of nationality informed (Article 7(1)).

Presumption of innocence applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive (Article 2). With regards to legal aid, Directive 2016/1919 explicitly mentions that the rights apply to those who are deprived of their liberty (Article 2 (1)). The Directives impose specific safeguards for vulnerable individuals; such further safeguards can affect the described timeline (e.g. legal aid always applies when suspects or accused persons are required by law to be assisted by a lawyer) and are discussed in the sections below.

Figure 1. Timeline of the applicability of various procedural rights Directives and the mutual recognition instruments



- Relationships to the mutual recognition instruments

There are links and interactions between the content of this chapter and the previous chapter on mutual recognition instruments. All the Directives make reference to the concept of mutual recognition in their Recitals and reiterate that measures promoting mutual trust must be in place for the principle of mutual recognition to operate well. The Directives aim to contribute to this process by establishing common minimum rules on the protection of procedural rights of suspects and accused persons. Such common minimum rules may also, indirectly, remove obstacles to the free movement of citizens throughout the EU. All the Directives (except presumption of innocence) also make an explicit reference to the EAW, highlighting their specific applicability to EAW proceedings. None of the Directives explicitly mention EIO, ESO, PAS or TOP (although two of the mutual recognition instruments – TOP and PAS – apply to the post-trial phase, whereas the Directives apply to the pretrial and trial stages).

In the following sections we describe each Directive and present findings (from the review of literature and interviews) as to the gaps in the extent to which the rights are protected in practice, and (where there is evidence) of the barriers or reasons for these gaps.

The review of literature and interviews led to the identification of over seventy gaps and barriers in relation to the six procedural rights Directives. The research team reduced these to around twenty gaps and barriers by aggregating some of the similar issues (for example, common gaps encountered in accessing and effectively applying remedies for the same procedural right) and excluding the ones that were less regularly mentioned in the literature. Specifically, we do not include gaps that did not have impact on the level of individuals (the focus of this research project is on the impact at individual level in terms of protecting fundamental rights and freedoms). For example, following this approach we excluded from this analysis the gap that the Directive on presumption of innocence does not apply to legal persons and the gap that the Directive on interpretation and translation does not regulate working conditions of legal interpreters and translators.

II – Directive on the right to interpretation and translation

- Background

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings was not only the first Directive adopted from the Roadmap, but was the first Directive under the Lisbon Treaty, the first Directive in the field of criminal justice (until then one had recourse to framework decisions only), the first Directive on language since the founding Treaties of the EU and, of course, the first Directive on issues of translation and interpretation.

The European Commission IA preceding the Directive on interpretation and translation

The IA from the European Commission noted the increased movement within the EU and the perceptions among citizens and practitioners that justice systems in Member States, other than their own, are unfair. This perception could hinder the development of a European area of justice. The information collected from practitioners and stakeholders indicated that the accused was not guaranteed access to appropriate translation and interpretation services. Although the Commission recognised that the extent of the problem was still unclear, three specific problems were identified:

- Absence of minimum standards hampers mutual trust.
- Not understanding the proceedings may raise an issue of fair trial.
- Individuals surrendered under the EAW are excluded from rights under Article 6 ECHR.

Source: EC, 2009.

The negotiations on the proposal overlapped with the signing and entry in force of the Treaty of Lisbon. The first Commission proposal for a Council FD in this area was followed by a Member States' Initiative and a new, competing, Commission Proposal. The LIBE Committee chose the Member States' initiative as the basis for its work (Cras & de Matteis, 2010; Hertog, 2015).

On 20 October 2010, the EP and the Council adopted the Directive. It lays down the rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of an EAW. Article 2 requests that Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided with interpretation during any questioning. With regards to the right to translation, Article 3 establishes that Member States shall ensure that suspected or accused persons are provided with a written translation of essential documents. Member States shall

meet the costs of interpretation and translation (Article 4), and take concrete measures to ensure quality control (Article 5). Judges, prosecutors and judicial staff involved in criminal proceedings should be trained to communicate efficiently with interpreters (Article 7).

The deadline for EU Member States to transpose Directive 2010/64/EU on the right to interpretation and translation into national law expired in 2013. At October 2017, all Member States communicated to the European Commission as having adopted national transposition measures (EUR-Lex, 2017b). Early resolution of infringement cases without a court judgment were closed in 2015 for Ireland and Slovenia, which previously failed to notify national transposition measures for the Directive (EC, 2016c). In 2016, the Commission opened an infringement case against Lithuania for non-communication of national measures transposing the Directive (EC, 2017f). Clarifications informing the implementation process have also been provided by the CJEU, as summarised in the box below.

Interpretation of the Directives by the CJEU

Since the adoption of the first Directive of the Roadmap, it was clear that both the CJEU and the national courts would play a pivotal role in their effective implementation. In particular, in view of the post-Lisbon jurisdiction, the interpretative activity of national and European judges can play a defining role in ensuring that the minimum rules of the Roadmap Directives really contribute to more effective defence rights throughout the EU. As of July 2017, we identified three relevant cases dealing with the Directives of the 2009 Roadmap: *Covaci*, *Balogh* and *Sleutjes*.

In *Covaci*, the CJEU clarified that while the scope of Directive 2010/64 is confined to translating documents from the language of the proceedings into a language understood by the accused or suspect, Member States have the ability to confer broader protections. With respect to the right to information, the Court held the Directive 2012/13 does not preclude legislation requiring a non-resident to nominate a person who could be served on his or her behalf, provided this does not diminish the time the accused person has to file an objection. In *Balogh* the CJEU ruled that Directive 2010/64 is 'not applicable to a national special procedure for the recognition by the court of a Member State of a final judicial decision handed down by a court of another Member State convicting a person for the commission of an offence'. *Sleutjes* is still a pending case examining whether penal orders should be included among essential documents as AG Wahl proposed in a May 2017 opinion.

The first rulings seem to indicate that the CJEU is willing to take up a role in contributing to the effective implementation of the procedural rights Directives. In particular in the *Covaci* case, the CJEU confirmed the breadth of the right to interpretation and showed its willingness to interpret the Roadmap Directives as a tool for guaranteeing a fair trial for suspects and accused persons.

3. Source: Lamberigts, 2015, Tinsley, 2013, Judgement of the court in *István Balogh*, Opinion of Advocate General Wahl delivered on 11 May 2017 in the case of *Sleutjes*; Cras, 2010.

- Gaps

During the negotiations surrounding the adoption of the Directive, particular attention was paid to the ECHR and the case law of the ECtHR (Cras and De Matteis, 2010, Hertog, 2015). Nevertheless, the Directive contains provisions that are potentially more restrictive in scope than the ECHR (Sayers, 2014). In particular, the Directive does not apply to a minor offences imposed by an 'authority other than a court having jurisdiction in criminal matters' and since minor offence are not defined, prosecutors may dispose deliberately of offences in a way that will avoid triggering the right (Sayers, 2014).

Our review of previous research and findings from expert stakeholder interviews highlight some challenges that may undermine the right to interpretation and translation. There is variation in how the rights are implemented in the Member States and inconsistencies across EU. The most notable issues identified in the literature are listed below. We have classed these

as ‘gaps’ since they are all instances where standards in the Directive are not enforced in practice. The literature says little about the barriers or causes of these gaps:

- **Inadequate transposition and implementation of quality requirements.** Practical difficulties can arise since there are no provisions setting standards for the quality of interpretation, save for a possible non-binding recommendation (Sayers, 2014). Even where official registers of interpreters are established, the Directive does not specify what ‘appropriately qualified’ means (Blasco Mayor and Pozo Triviño, 2015, FRA, 2016f). In practice, seven Member States did not take any concrete measure to ensure quality (CCBE, 2016b). Only some Member States have set up registers of legal interpreters and there are no common standards set within the Member States as to the skills and qualifications of interpreters (CCBE, 2016b, FRA, 2016f). Where registers do exist, the requirements for entry onto these registers are insufficiently stringent (Fair Trials, 2016d); there are weaknesses in vetting and registration processes and lack of suitably qualified interpreters (CCBE, 2016b).
- **Lack of systematic approaches to ascertain the necessity of translation/interpretation.** There is no clarity regarding the minimum level of understanding below which individuals should be provided with interpretation and translation services (FRA, 2016f). There are informal ways to deal with the matter rather than formal procedures (CCBE, 2016b), and needs are identified on the basis of subjective assessments and ‘gut feeling’ (PRO-JUS, 2017).
- **Different approach to essential documents for translation.** Five Member States do not list in their national legislation the ‘essential’ documents specified in the Directive and there is no common practice on which documents are translated (FRA, 2016f) and which documents count as ‘essential’ (PRO-JUS, 2017); the competent authorities make case-by-case decisions (CCBE, 2016b). Due to budget and time constraints, oral rather than written translation is provided (FRA, 2016f). Concerns have been raised about whether the provision permitting an oral summary to be used as a substitute for a written translation (Article 3(6)) is compatible with the ECHR (Council of Europe, 2010a).
- **Lack of safeguards for the confidentiality of communication between suspected or accused persons and their legal counsel.** The Directive does not specify who should appoint the interpreter; using the same state-appointed interpreters to interpret both during police interrogations and communications between a defendant and their lawyer may present a conflict of interest (CCBE, 2016b).
- **Some Member States limit the scope of the right to interpretation for communication with legal counsel.** In some legal systems, interpretation services for communicating with legal counsel are provided for a limited length of time only, or only for specific types of procedural actions, or are largely dependent on the provision of legal aid (FRA, 2016f). According to Sayers (2014), the Directive itself lacks a clear and unequivocal determination of the right in relation to communications between suspect and counsel, stating only that this should happen ‘where necessary for the purpose of safeguarding the fairness of the proceedings’ and only ‘in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications’ (Article 2(2)). Sayers argues that this could be seen as contradicting the text of the Directive’s Recitals, which extend to the interpretation of private communications between counsel and suspect (Recital 19).

- **Inability to challenge poor quality of interpretation and ineffective remedies.** Some Member States have not introduced specific complaint procedures in their laws (CCBE, 2016b, FRA, 2016f), and there are also differences about when such complaints can be admitted during the proceedings (FRA, 2016f), concerns exist about the lack of effective remedies available and what remedy is provided if quality is successfully challenged (Fair Trials, 2016d).

III – Directive on the right to information in criminal proceedings

- Background

A Directive on the right to information in criminal proceedings was the second step of the Roadmap. Following a lengthy negotiation (nine trilogues were necessary compared to the only three for measure A) on 22 May 2012, the European Parliament and the Council adopted Directive 2012/13/EU on the right to information in criminal proceedings. During the negotiations the Council, together with the European Parliament, argued for and secured a more extensive and protective right than those originally proposed by the European Commission (Cras and De Matteis, 2010).

The European Commission IA preceding the Directive on the right to information

The IA from the European Commission (2010) pointed out that there was insufficient trust between judges and prosecutors of different Member States and divergences in practice. A number of high profile cases had damaged the perception of justice in certain Member States. A crucial aspect of the problem was a failure on the part of Member States' authorities to give adequate information to suspects and accused persons, and, in particular, information about what rights they have and what they are accused of. Specifically, the Commission IA highlighted three problems:

- Insufficient information has adverse effects on criminal proceedings and renders these proceedings unfair
- Insufficient information in criminal proceedings has adverse effects on judicial cooperation between Member States
- The existing legal standards do not offer adequate protection to suspects and accused persons:
 - Rights to information contained in the ECHR do not go far enough
 - There are shortcomings in the procedure for obtaining redress.

Stakeholders consulted confirmed the seriousness of the problems highlighted and the fact that across the EU these problems, whilst not endemic, can occur in most Member States.

Source: EC, 2010b.

The Directive requires Member States to ensure (Article 3) that suspects or accused persons are provided promptly with information concerning: (a) the right of access to a lawyer; (b) any entitlement to free legal advice and the conditions for obtaining such advice; (c) the right to be informed of the accusation; (d) the right to interpretation and translation;²⁶⁷ and (e) the right to remain silent (Article 2). With regards to the right to information about the accusation, suspects or accused persons should be provided with information about the criminal act they are suspected or accused of having committed (Article 6). With regards to the right of access to the materials of the case, all the essential documents should be available to arrested persons or to

²⁶⁷ The Directive on the right to information in criminal proceedings states that individuals must be given information about their rights (including the right to interpretation and translation) but as Recital 25 says, the way this right is applied is regulated by the Directive on the right to interpretation and translation in criminal proceedings.

their lawyers (Article 7). Furthermore, arrested persons must receive promptly a Letter of Rights from the law enforcement authorities written in simple language, providing information on their rights (Article 4).

The deadline for transposition into national law of Directive 2012/13 was the 2 June 2014. As of October 2017, all Member States, except for Belgium, communicated to the European Commission as having adopted national transposition measures (EUR-Lex, 2017c). Early resolution of infringement cases without a court judgment were closed in 2015 for Cyprus, Czech Republic, Luxembourg, Slovenia, Slovakia and Spain, which previously failed to notify national transposition measures for the Directive (EC, 2016c). In 2016, the Commission did not open any infringement procedure for this Directive (EC, 2017f).

- Gaps

Overall, the Directive appears to add value by incorporating and going beyond the standards of protection provided in the ECHR, extending the number of rights and obliging Member States to provide a Letter of Rights (Sayers, 2014, Tsagkalidis, 2017). Previous research and the interviews conducted highlighted some specific gaps and challenges that may undermine the rights ascribed by the Directive:

Exclusion of minor offences. As with the Directive on interpretation and translation, Article 2(2) of Directive 2012/13 excludes some minor offence. The CoE expressed its concerns about this provision, since the ECHR does not recognise any exemptions from the standards under its Article 6 with regard to minor offences (Sayers, 2014, Council of Europe, 2010b).

Extent, format, communication and temporal scope of the rights are not consistent across the Member States. Important differences exist with regards to the rights about which information is to be provided, the format of information provided (oral or written) and accompanying oral explanations to adapt information to the particular circumstances (CCBE, 2016b). Some Member States require information to be provided when a person acquires the status of a crime suspect, and some require information provision only when individuals are deprived of their liberty (CCBE, 2016b, FRA, 2016f). Member States also have different approaches in terms of when the information on the accusation is provided in the course of pretrial stages (FRA, 2016f) and, as a consequence, access to the case file prior to questioning is generally lacking (Fair Trials, 2016e). Moreover, Member States have different approaches in terms of the extent to which they enable access to materials of the case during the various stages of proceedings, including how they use available grounds for refusing access (FRA, 2016f).

The information provided is often not clearly understandable. Information about rights is frequently provided by using language from the relevant national criminal law provisions, which is often overly legalistic and complex (CCBE, 2016b, FRA, 2016f). Likewise, the Letter of Rights for suspects or accused persons who are arrested or detained is not drafted in an easily accessible language. The Letters of Rights were particularly found to be drafted in inaccessible language, often simply copied from the underlying legal provisions, and not always translated for non-native speakers (CCBE, 2016b, Fair Trials, 2016a).

The Letter of Rights for suspects or accused persons who are arrested or detained are not always provided in a timely way. In some Member States, a Letter of Rights is not provided prior to the first questioning, but only during or even after interrogation (Fair Trials, 2016a).

Letters of Rights do not always cover all the rights prescribed by the Directive (PRO-JUS, 2017, FRA, 2016f)

Some Member States do not have a specific Letter of Rights for EAW, as prescribed by the Directive. They provide only general Letter of Rights (FRA, 2016f).

Lack of safeguards for vulnerable individuals. The Directive makes no specific provision for the delivery of the Letter of Rights to vulnerable suspects, for example, to partially sighted or juvenile suspects (Sayers, 2014). In practice, the Letter of Rights often lacks safeguards for vulnerable individuals (FRA, 2016f) and did not take into account the needs of children as vulnerable persons considering their age, language and culture (PRO-JUS, 2017).

Some Member States seem to allow extensive grounds for refusal to access materials of the case at the pretrial stage (Fair Trials, 2016d). In particular, the vague formulations in some Member States legislation can lead to an overuse of refusal grounds for access to the materials of the case (FRA, 2016f). Moreover, to be compliant with the ECHR, any restrictions on this right must be justified on the facts of the case, have a clear basis in domestic law and not be excessively broad in their scope; however, the Directive does not clearly specify these requirements (Sayers, 2014).

Challenges, difficulties and differences in accessing the materials, and in the timing for individuals already in detention. While the Directive does not allow any ground for refusing to provide access to materials essential for challenging arrest and detention, Member States seem to allow refusals in such cases (FRA, 2016; CCBE, 2016b, Fair Trials, 2016e, FRA, 2016f).

Costs. Although access should be free of charge there are usually costs associated with access to the material of the case, e.g. photocopies (FRA, 2016f).

IV – Directive on the right of access to a lawyer

- Background

The Roadmap states that measure C should to deal with ‘Legal advice and legal aid’ and measure D with ‘Communication with relatives, employers and consular authorities’. In its 2011 proposal, the Commission decided to combine one aspect of measure C (legal advice, ‘C1’) with measure D. Various Member States criticised the fact that the right to legal aid (‘C2’) was excluded, but the Commission replied that this split had been carried out in order to speed up the process in light of the need for action on the substantive right arising from the *Salduz* case law, which to a large extent inspired the Directive (Cras, 2014). NGOs appeared more understanding of the decision to exclude legal aid, with Fair Trials noting that “whilst we recognise that, in order to facilitate the passage of the Directive, the question of legal aid was removed from consideration and postponed to a later date, progress on legal aid cannot be delayed indefinitely” (Fair Trials *et al*, 2013).

The European Commission IA preceding the Directive on access to a lawyer

The IA from the European Commission (2011) pointed out that at the time no adequate and properly enforced standards governed the provision of access to a lawyer and notification of custody across the EU. This entailed adverse effects for judicial cooperation between Member States, and also for the fundamental right of suspect and accused persons.

The specific problem identified by the IA was that there was insufficient access to a lawyer and notification of custody in many Member States. In several Member States there was no entitlement for a suspect to see a lawyer before any police questioning and/or no entitlement to have the assistance of a

lawyer during police questioning.

There are discrepancies between Member States about the possibility of waiving one's right to a lawyer. Evidence obtained without a lawyer being present had a different status from one Member State to another. Finally, in EAW proceedings, there were no EU rules governing legal advice for the person sought in both the issuing State and the executing State, which undermines trust. Although the scope of the problem was said to be unclear, since Member States did not (and still do not) collect data, some examples were presented to illustrate the potential scale: in the Netherlands only juveniles are entitled to the presence of a lawyer; and in France, under the *garde à vue* procedure, the suspect does not have the benefit of legal assistance while undergoing questioning.

Source: EC, 2011e.

Four areas of difficulty appeared during the negotiations: (1) relating to the interpretation of the concept of the right of access to a lawyer; (2) relating to the fact that, on several points, the Directive has a far-reaching effect on the national legal systems; (3) relating to the safeguards that should apply regarding derogations and confidentiality; and (4) relating to the changes in respect of the EAW system (Cras, 2014).

In October 2013, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest was adopted. The Directive sets minimum rules seeking to guarantee the right of suspects and accused persons in criminal proceedings, as well as requested persons in EAW proceedings to have confidential meetings with a lawyer from very early stages of the procedure (Article 3 and 4), to have their lawyer participate effectively during questioning (Article 3(3b)), to have a third party of choice informed upon deprivation of liberty (Article 5), and to communicate with at least one person of their choice (Article 6). For non-nationals, the right to communicate with their consular authorities is also protected (Article 7).

The deadline to transpose Directive 2013/48/EU expired in November 2016. As of October 2017, all Member States except Bulgaria reported to the European Commission measures to transpose the Directive (EUR-Lex, 2017d).

- Gaps

Directive 2013/48/EU, in particular the part related to the right of access to a lawyer, attracted large scholarly attention before its adoption (Spronken, 2011, Heard and Shaeffer, 2011, Blackstock, 2012). Following its adoption scholars have argued that, due to the fact that the Directive is a compromise, it more or less repeats the case law of the Strasbourg court or even falls below the standards set in that case law (Winter, 2015, Anagnostopoulos, 2014). Defence lawyers and human rights lobby groups wanted a more ambitious text (Cras, 2014). Cape and Hodgson argue that the success of the Directive as implemented in practice will depend on whether states choose to make the minimum changes necessary to ensure formal compliance, or whether they embrace the programme of safeguards more enthusiastically. They also recognise that perhaps the most challenging hurdle is to change the culture of the police, lawyers, prosecutors and judges, so that they understand and subscribe to the value of procedural rights (Cape and Hodgson, 2014).

Although the recency of the deadline makes assessment of transposition difficult at this stage, the research mentioned above from Fair Trials, the CCBE, and PRO-JUS, academics' assessment of the Directive, and the interviews conducted provide some insights on the implementation issues.

- **Minor offences excluded.** In relation to the scope of the Directive, again there is concern that the Directive excludes minor offences from its protection (Sayers, 2014).
- **Passive or non-existent advocacy.** The Directive does not make active participation by a lawyer a universal right nor does it set a specific standard for it (Sayers, 2014). Although Article 3(3)(b) of the Directive sets out the right of the suspect for his/her lawyer to 'be present and participate effectively', this participation is subject to the specific limitation that it must be 'in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned'. In practice, even when a lawyer was present their participation was often found to be passive or non-existent, especially when the lawyer was provided via a legal aid scheme; this was partly attributed to time and resource constraints (Fair Trials, 2016e).
- **In some Member States' legislation there are limits to the role permitted to lawyers during questioning of suspects.** For example, to the timing of questioning and consultation in court (CCBE, 2016b).
- **Waiving the right of access to a lawyer.** The Directive is at possible variance with the ECHR in relation to the suspect's capacity to waive his or her right under Article 9 (Sayers, 2014). In practice, concerns are raised where police encourage the accused to waive their right to legal counsel (Fair Trials, 2017).
- **The scope of the derogations is overly broad and open to abuse.** Articles 3(5) and 3(6) permit Member States to make temporary derogations to the right to access a lawyer in exceptional circumstances and at the pretrial stage. Constraining limitations on the power to derogate are included in Recitals 30-32, rather than in the main body of the Directive, are therefore not binding and could thus allow derogations that are inconsistent with ECHR cases like *Salduz* (Sayers, 2014). Another aspect of the Directive that has been criticised is the provision in Article 8(2) that a derogation decision may be taken not only by a judicial authority, but also by another competent authority, thus allowing police to exclude legal assistance at the most crucial part of pretrial investigations (Anagnostopoulos, 2014). In practice, where temporary derogation is permitted, Member States have their own criteria that are not as strict or detailed as the exceptional circumstances demanded in the Directive, and in this respect they are not in compliance with the Directive (CCBE, 2016b).
- **Weak remedies.** It has been argued that the Directive does not provide sufficient protection against the use of evidence acquired in breach of the right of access to a lawyer or while the suspect was denied such access on the basis of the derogation provisions of Article 3(6) of the Directive (Anagnostopoulos, 2014).

V – The European Commission recommendation on procedural safeguards for vulnerable adults

- Background

Previous research on vulnerable groups (Verbeke et al., 2015, Fair Trials, 2012b), clearly demonstrated that there are different approaches towards the protection of the procedural rights of vulnerable suspects. More importantly, such research demonstrates that the effective

participation principle is not adhered to by Member States and its application should be made more uniform in practice.

Examples of recurring problems in respect to vulnerable persons, identified in research from 2012 (Fair Trials, 2012b), include:

The treatment of vulnerable suspects varies from case to case and there is often no consistent approach even within the same country.

Police often lack awareness of, and therefore fail to identify, vulnerabilities that are not immediately physically obvious, for example mental health problems.

The definition of 'vulnerable' varies widely; drug addicts, ethnic minorities and non-nationals in particular are often not covered by existing safeguards.

Police often lack training on how to deal with problems such as addiction and mental health issues, and are often disrespectful towards vulnerable suspects.

Treatment of suspects with mental disabilities, mental health problems and addictions is particularly poor.

In the 2013 IA accompanying the children Directive (see section below), the Commission explicitly recognised these issues and pointed to significant shortcomings in the protection of the specific needs of children and vulnerable adults alike. Nevertheless, in the same document, the Commission stated that the difficulty of determining an overarching definition of a vulnerable adult (since there is no international or European legal instrument defining a vulnerable adult) and the existence of fewer relevant international standards and provisions for vulnerable adults meant that it was not possible to take legally binding action at the EU level. As a consequence, the Commission chose a recommendatory instrument and on 27 November 2013 adopted the 'Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings'.

Vulnerable suspects are those who are not able to understand and to effectively participate in criminal proceeding due to age, mental or physical condition or disabilities, or any other circumstances (Recital 1 of the Recommendation) that may thereby lead to inequality of arms, unfair treatment and, overall, their inability to receive a fair trial. To ensure that vulnerable persons are promptly identified and recognised as such, in the Recommendation the Commission calls on Member States to facilitate a medical examination by an independent expert capable of determining the existence and the degree of their vulnerability (Section 2). Additionally, it specifically recognises the right to non-discrimination in the exercise of procedural rights and recommends that Member States presume the vulnerability of persons with impairments. Furthermore, it contains specific safeguards that should be in place to ensure that their procedural rights are sufficiently protected:

Vulnerable persons should obtain information about their procedural rights in a format accessible to them. Moreover, their lawyer must be informed of their rights, and a legal representative should be present at the police station and during court hearings.

The right of access to a lawyer cannot be waived.

Vulnerable persons should have access to systematic and regular medical assistance throughout the proceedings.

Interrogations at pretrial stage should be audio-visually recorded.

PTD should be a measure of last resort and, if necessary, it should take place under conditions suited to the needs of the vulnerable person.

Competent authorities should take appropriate measures to protect the privacy, personal integrity and personal data of vulnerable persons.

Competent authorities in criminal proceedings involving vulnerable persons should receive specific training.

- Gaps

The instrument is not binding. The biggest recognised obstacle to achieving effective results and improvements is the instrument's form; non-binding by nature, it leaves the Member States with the suggestion that they report back and inform the Commission of the follow-up on the recommendations within 36 months of its notification. The IA accompanying the children Directive demonstrated the unlikelihood of significant progress being made in the protection of vulnerable persons' rights in the absence of major legislative developments, and that the absence of any method of enforcement might result in only a variable improvement in the Member States. The EPRS in its appraisal of the Commission IA highlighted that this would presumably imply that the introduction of a non-binding Recommendation may not be sufficient to achieve the desired result (EPRS, 2014).

Member States do not have detailed rules or guidance for practitioners. In 2016, the FRA undertook research into the extent to which the procedural rights to translation, interpretation and information by vulnerable persons were being effectively exercised (FRA, 2016f). The Agency's findings show that most Member States' laws contain general references to the needs of persons with disabilities and children, however, national legislators rarely introduce more detailed rules, and other policy documents provide little guidance on how to accommodate these needs.

VI – Directive on presumption of innocence and the right to be present at the trial

- Background

In November 2013, the Commission presented a package of three further measures to complete the rollout of the 2009 Roadmap, including a proposal for a Directive on the presumption of innocence. From the moment of its presentation, the proposal met with criticism since the issue of presumption of innocence was not mentioned in the Roadmap or in the Stockholm programme (Cras and Erbeznic, 2016). Provisions on the right to be present at the trial, on trials in absentia and on the right to a new trial were also not in the Roadmap.

The European Commission IA preceding the Directive on presumption of innocence

The IA from the European Commission (2013) recalled two general problems: (1) there was insufficient protection for fundamental rights of suspected and accused persons because of insufficient protection of the principle of presumption of innocence in the EU; and (2) insufficient protection of fundamental rights caused insufficient mutual trust between Member States in the quality of their respective judicial systems. This hampered the smooth functioning of mutual recognition of judgments and judicial cooperation

The IA concentrated on the four following specific aspects of the presumption of innocence and related fair trial rights, the protection of which was not sufficient within the EU:

- Non-respect of the right not to be presented as guilty by authorities before final conviction.
- Non-respect of the principle that the burden of proof is on the prosecution and of the right of the accused to benefit from any doubt.
- Insufficient protection of the right not to incriminate oneself, the right not to cooperate and the

<p>right to remain silent.</p> <ul style="list-style-type: none"> • Negative effects of decisions rendered in the absence of the person concerned at the trial (in absentia). <p>While the lack of data meant that the IA could not define the exact scope of the problem, the IA recalled that in the years between 2007 and 2012, 10 EU Member States were found by the ECtHR to be in violation of the right to be presumed innocent. The initial appraisal by the EPRS in 2013 noted the absence of data available about the extent of the problem being addressed and the consequent reliance of the Commission IA on anecdotal evidence. In particular, this raised questions about benchmarking; the EPRS noted that if the precise scope of the problem is unknown, then the extent to which the success of any new measure in the field can be measured with any accuracy must presumably also be limited.</p>
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Source: EC, 2013b, EPRS, 2014.

One of the main issues subject to extensive negotiations was a proposed Article on the reversal of the burden of proof. The Commission agreed to remove this from the text following calls to do so by the Parliament and the Council. Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings was then adopted in March 2016. The Directive is, to a large extent, a codification of the case law of the ECtHR (Cras and Erbeznik, 2016).

Directive 2016/343 lays down common minimum rules concerning: (a) certain aspects of the presumption of innocence in criminal proceedings; and (b) the right to be present at the trial in criminal proceedings (Article 1).

Until proved guilty according to law, suspects and accused persons shall be presumed innocent (Article 3), not referred as being guilty by public authorities and in judicial decisions as being guilty (Article 4), and not presented as being guilty, in court or in public, through the use of measures of physical restraint (Article 5). Member States shall also ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution (Article 6). The Directive covers two rights linked to the principle of presumption of innocence: the right to remain silent and the right not to incriminate oneself (Article 7). The other right protected by Directive 2016/343 is the right for suspects and accused persons to be present at their trial (Article 8). Member States may provide that a trial that can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State (Article 8(2)). If these conditions are not met, the Directive grants the right to a new trial or to another legal remedy (Article 9). According to the Directive, EU countries must ensure that effective remedies are in place for breaches of these rights (Article 10).

Directive 2016/343 needs to be transposed by 1 April 2018. As of October 2017, Czech Republic, France and Spain have already reported to the European Commission taking measures to transpose the Directive (EUR-Lex, 2017a).

- Gaps

As the transposition deadline has not passed, it is too early to assess whether gaps identified in the impact assessment have been addressed as a result of the practical implementation of the

Directive. While not yet affirmed as gaps in practice, the following points were identified during the literature review as possible gaps or gaps relating to the scope of the Directive:

Application to natural persons only. Although not directly relevant for this study since the focus is on individual level, it is worth recalling that, differently from the previous Directives, the EU legislator made the explicit choice of limiting the scope of application of the Directive to natural persons only, therefore excluding legal person (Lamberigts, 2016).

Directive does not reflect requirements of the ECHR and its case law. Sayers argued that the Directive does not consistently reflect basic requirements of the ECHR and its case law, despite the non-regression clause (Article 12). In particular:

- **Standards for trials in in absentia appear to be narrower than the position set out by the ECtHR.** The Directive (Article 8) allows sentences handed down against a person in their absence to be enforced, without clearly requiring that the person – who could be in prison for an offence in relation to which their own evidence was never heard – be informed in writing of their right to a retrial or clarifying what that retrial should entail (Sayers, 2015, Fair Trials, 2016d).
- **Provisions on remedies are worded generally and do not reflect ECtHR case law.** The provisions on remedies, as set by Article 10 of the Directive, do not reflect the current state of ECHR/EU law (Sayers, 2015). Stronger wording on remedies as proposed by the EP was not agreed upon and the Directive includes only generalised wording (Cras and Erbeznik, 2016); risking the possibility that little may change on the ground until the CJEU interprets the provision and provides guidance on what should happen when the rights in the Directive are breached (Fair Trials, 2016d).

Lack of application to people who become suspects during an investigation. Unlike the Directive on access to a lawyer (Article 2(3)), this Directive does not extend protection explicitly to those ‘persons other than suspects or accused persons who, in the course of questioning, become suspects or accused persons’. There appears to be no justification for this inconsistency (Sayers, 2015).

Possible creation of perverse incentives to plead guilty. Article 6(2b) of the Directive permits Member States’ judicial authorities to take into account ‘the cooperative behaviour of suspects and accused persons when sentencing’. No explanation is given for what ‘cooperative behaviour’ means and Sayers argues that an ‘admission of guilt’ is not excluded. Since discounts for cooperative behaviour are common in many criminal justice systems, this may create perverse incentives to plead guilty and may compromise the right of defendants to be presumed innocent as they relieve the prosecution of the burden of proving guilt (Sayers, 2015).

VII – Directive on Procedural Safeguards for Children

- Background

Measure E of the Roadmap invited the Commission to submit proposals regarding ‘special safeguards for suspected or accused persons who are vulnerable’. However, since it appeared difficult to find a common definition of ‘vulnerable persons’, and in view of considerations linked to the principles of subsidiarity and proportionality, the Commission decided to restrict its proposal to one category of vulnerable persons that could easily be defined, namely suspected or accused children (Cras, 2016).

The European Commission IA preceding the Directive on safeguards for children

The IA from the European Commission (2013) included an analysis of the legislation in place in the Member States. This found that procedural safeguards granted to both children and vulnerable adults were insufficient to guarantee their effective participation in criminal proceedings. This was further supported by the case law of the ECtHR. Not only were the national and international legal frameworks found to be insufficient, but the lack of overarching protection of children and vulnerable adults by the measures already adopted according to the Stockholm Programme were reported as a general problem.

The IA highlights that the insufficient protection of children and vulnerable adults affects mutual trust and hampers the smooth functioning of mutual recognition.

Specific problems identified in the 2013 IA accompanying the proposal for this Directive were as follows:

- The vulnerability of suspected or accused persons was not sufficiently assessed from the very beginning of the criminal proceedings.
- Vulnerable persons, in particular children, were not sufficiently assisted throughout the criminal proceedings and their access to a lawyer is not ensured.
- The lack of particular safeguards taking into account children's special needs at the various stages of the proceedings.
- The lack of training of professionals in contact with children and vulnerable adults, as well as lack of specialisation of judges.

The initial appraisal of the Commission IA by the EPRS (2013) found that it provided a thorough analysis and clear presentation, but also identified a number of issues linked to the choice of a non-binding instrument to deal with vulnerable persons other than children and the decision not to address the lack of definition of 'vulnerable adult'.

Source: EC, 2013b, EPRS, 2014

While the proposal for the children Directive was generally welcomed by the major stakeholders and almost all Member States expressed positive reactions (Cras, 2016), some objections were raised at national level (by the UK and the Netherlands) related to the principle of subsidiarity and proportionality (De Vocht et al. 2014). The Directive drew substantive inspiration from international standards, such as the UN Convention on the Rights of the Child (1989) and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010). The Directive was adopted in May 2016.

Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings lays down procedural safeguards allowing children (i.e. persons under the age of 18 (Article 3(1))) who are suspects or accused in criminal proceedings to be able to follow and understand the proceedings and to fully exercise their right to a fair trial. Specifically, Member States shall adopt specific measure to ensure that children have the right to information (Article 4 and 5), assistance by a lawyer (Article 6) and legal aid (Article 18). Children who are suspects or accused persons in criminal proceedings should be individually assessed in order to identify their specific needs in terms of protection, education, training and social integration (Article 7). Children have the right to be accompanied by the holder of parental responsibility during the proceedings (Article 15), the right to be present at the trial and the right to a new trial in case of an absentia conviction (Article 16).

Furthermore, the text imposes certain obligations upon Member States with regard to detention and detention conditions (Article 10–12) (see also Chapter 4 in relation to detention conditions). Where children are detained, special protection measures should be in place to address their particular vulnerabilities (Recital 48). Directive 2016/800 sought translate into EU law the widely accepted international recommendation that deprivation of liberty upon

children shall be imposed only as a measure of last resort and limited to the shortest appropriate period of time (Article 10(2)).

Member States needs to transpose the Directive by June 2019. As of October 2017, Spain has already reported to the European Commission taking measures to transpose the Directive (EUR-Lex, 2017e).

- Gaps

As the transposition deadline has not passed it is too early to assess whether gaps identified in the impact assessment have been addressed as a result of the practical implementation of the Directive. While not yet affirmed as gaps in practice, the following points were identified during the literature review as possible gaps or gaps relating to the scope of the Directive:

- Relevant definitions are lacking.** The Directive does not set out a definition of vulnerability, does not make any distinction in age, and does not make any reference to the specific characteristics of a juvenile's vulnerability. A definition of the term 'questioning' is also missing and this has been identified as potentially problematic as it could allow a juvenile suspect to be questioned in several different ways and with several different functions (De Vocht et al., 2014).
- **The Directive does not apply to minor offences or non-criminal proceedings.** The exclusion of minor offences in Article 2(5a) means the Children's Directive offers lower protections than existing human rights standards (which do not make distinctions between different categories of offence due to the significant impact which any criminal proceedings and sanctions may have on the life of a child) (Fair Trials, 2016d). The Directive does not apply to other forms of non-criminal proceedings. There is a risk that Member States could dispense with the protection of procedural rights by labelling a certain type of proceedings non-criminal, even if such proceedings may lead to the imposition of certain restrictive measures (De Vocht et al., 2014).
- **The Directive has no requirement of mandatory representation by a lawyer.** The inclusion in the initial Commission proposal of 'mandatory assistance' by a lawyer (Article 6) was discussed extensively during the negotiations (Cras, 2016). The final text is a compromise which offers the possibility for Member States to derogate from the right under specific circumstances,²⁶⁸ but a lawyer is mandatory when a juvenile is brought before a court to decide on PTD and when they are in detention (Article 6(6)). The decision to remove the requirement of mandatory representation by a lawyer has been argued to significantly weaken the safeguards established by the Children's Directive (Fair Trials, 2016d). This could be further exacerbated by the decision to leave the question of legal aid provision to Member States to be answered through national law, which may result in continued divergence and shortcomings, as highlighted in the Commission's IA (EC, 2013b).
- **Complex issues are not addressed in sufficient detail.** For example, in providing for the right to an individual assessment, the Directive does not make clear what exactly is

²⁶⁸ Provided that this complies with the right to a fair trial, Member States may derogate where assistance by a lawyer is not proportionate in the light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence, it being understood that the child's best interests shall always be a primary consideration (Article 6(6)) of the Directive.

to be assessed, how and when; in regulating the right to information, no attention has been paid to how information should be given; and in the provision on questioning, there are no (minimum) rules on how to question (De Vocht et al., 2014).

- **The Directive allows derogation from the duty to provide an assessment** (Fair Trials, 2016d).
- **There are few provisions concerning the need for an adult to be involved in the proceedings** and no specific provisions on whether the adult should necessarily be present at given points of the proceedings or during questioning (De Vocht et al., 2014). Concern has been expressed about limitations to the right of the child to meet with the holder of parental responsibility (or appropriate adult) as soon as possible following deprivation of liberty to what is ‘compatible with investigative and operational requirements’ (Fair Trials, 2016d).

VIII – Directive on legal aid

Measure C as foreseen in the Roadmap addressed two issues: legal advice and legal aid. However, in its proposal for a Directive in relation to measure C, which the Commission presented in June 2011, the aspect of legal aid had been left out since it was considered that this issue warranted a separate proposal owing to the specificity and complexity of the subject (Council of the European Union, 2011).

The European Commission IA preceding the Directive on legal aid.

The IA from the European Commission (2013) addressed a two-fold general problem: (a) insufficient protection of fundamental rights of suspected and accused persons in the EU; and (b) a need to strengthen mutual trust between Member States as a result of deficient standards on legal aid.

More specifically the IA argued that the insufficient access to effective legal aid for suspected and accused persons in the EU was caused by four underlying factors:

- Insufficient possibilities to access legal aid in extradition proceedings under the EAW in the Member States.
- Legally aided assistance was not always available during the early stages of the proceedings, especially before an official decision on legal aid has been made, although the right of access to a lawyer applies from the time a person is suspected.
- The eligibility criteria were too restrictive to qualify for legal aid; there were wide variations in how the eligibility testing (means tests and interest of justice or merits test) was done in the Member States.
- Shortcomings in the quality and the effectiveness of legal assistance provided through legal aid schemes.

Source: EC, 2013c.

The original Commission proposal for the legal aid Directive in 2013 received a ‘mixed reception’. The concerns were that some elements were included in a non-binding Commission Recommendation (rather than in the proposal for the Directive, which would be binding), some Member States felt the scope was too wide, while others (and the EP) felt it was too narrow (Cras, 2017). Unusually, during the course of the negotiations, the LIBE Committee of the EP asked for an ex ante IA of the impact of their proposed amendments to the Commission Proposal (see below) (EPRS, 2016). Commentators have argued that the final text of the Directive, agreed after nine trilogues, was influenced by the content of the Commission Recommendation and by proposal from the EP (Cras, 2017).

The IA of substantial amendments proposed by the EP during the course of the negotiations on the Directive on legal aid

The seven amendments proposed by the EP focused on a range of legal aid issues and have different objectives:

- Amendment 29 aimed to extend the scope of the proposed Directive to suspects or accused persons who are not deprived of liberty and to ordinary legal aid, in addition to provisional legal aid.
- Amendment 31 excluded minor offences from the scope of the proposed Directive in specific circumstances.
- Amendment 39 aimed to reduce the possibility for Member States to recover legal aid costs.
- Amendment 41 established that decisions granting legal aid and assigning a lawyer should be made promptly by an independent authority.
- Amendment 42 aimed to extend the scope of the right to legal aid from the issuing Member State of an EAW to any Member State where evidence gathering or other investigative acts are being carried out.
- Amendment 43 created an obligation on Member States to put in place systems ensuring the quality of legal aid and the independence of and training for legal aid lawyers.
- Amendment 44 required Member States to provide sufficient remedies for those whose right to legal aid has been breached.

The study (conducted for the LIBE Committee by an independent contractor) concluded that the amendments proposed by the EP would have a positive impact on the fundamental rights of suspects or accused persons, even though they would imply certain additional administrative costs for Member States.

The agreed text included substantive modification as regards the scope of application of the Directive, which was broadened to include: a right to ordinary legal aid and not only to provisional legal aid; clear guidance on criteria to apply when conducting a means test and/or a merits test to determine whether a person is eligible for legal aid; new provisions on the right to information and effective remedy, as well as on legal aid quality and professional training of staff involved in the decision-making and of lawyers providing legal aid services.

Source: EPRS, 2016.

Directive 2016/1919 establishes minimum rules regarding the right to legal aid for suspects and accused persons in criminal proceedings, and for persons subject to an EAW. For the purposes of the Directive, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer (Article 3). In addition to the situation in which suspects or accused persons are deprived of liberty, the right to legal aid in criminal proceedings should apply when suspects or accused persons are required by law to be assisted by a lawyer, and when are required or permitted to attend an investigative or evidence gathering act if some minimum conditions are satisfied (Article 2). Suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require, and after a means test and/or merits test are applied (Article 4). Member States shall take necessary measures, including with regard to funding, to ensure quality of legal aid services and training (Article 7). Member States must also ensure that the particular needs of vulnerable persons are taken into account in its implementation (Article 9).

The deadline to Directive 2016/1919 at national level will expire in May 2019. As of October 2017, France has already reported to the European Commission taking measures to transpose the Directive (EUR-Lex, 2017f). In the view of one commentator the text of Directive is 'rather lean', but does allow Member States sufficient flexibility to transpose the Directive into their national legal orders (Cras, 2017).

- Gaps

As the transposition deadline has not passed it is too early to assess whether gaps identified in the impact assessment have been addressed as a result of the practical implementation of the Directive. While not yet affirmed as gaps in practice, the following points were identified during the literature review as possible gaps or gaps relating to the scope of the Directive:

The cost of providing legal aid may inhibit implementation. One of the main concerns that accompanied the Directive since its conception relates to the financial implications of the right to legal aid for the Member States. A study conducted by Fair Trials points to time and resource constraints in some Member States that often lead lawyers in the legal aid scheme to not dedicate sufficient time to the preparation of these cases (Fair Trials, 2016e).

No provision of emergency legal advice. Fair Trials argue that the removal of the concept of provisional legal aid from the text of the Directive leaves no system in place to provide emergency legal representation while a decision on legal aid is being taken (Fair Trials, 2016d).

Inconsistent eligibility test in the EAW. Fair Trials raised concerns that the eligibility test in EAW proceedings does not fully mirror the equivalent provision in the access to a lawyer Directive, which may complicate assessments of whether legal aid should be provided in a particular case (Fair Trials, 2016d).

Lack of application to people who are not deprived of liberty: An interviewee highlighted that since the Directive applies to suspects and accused persons who are deprived of liberty, individuals may face a choice between being detained but having access to free legal aid, and not being detained but having to pay for a lawyer.

IX – Barriers: the reasons for the gaps in the implementation of the Directives in practice

Our review of available literature suggests two main reasons for the gaps in the implementation of the Directives in practice: national laws did not transpose the minimum standards in a sufficient way; and the application of the relevant legal provisions in practice is not effective. Typical examples of weak transposition include national rules that did not ensure that suspects and accused persons are promptly provided with information, did not provide sound grounds for refusing access to materials, and which may not safeguard sufficiently quality (FRA, 2016f).

With regards to practical implementation, the literature review and interviews conducted pointed out that the majority of the deficiencies surrounding procedural rights in the EU are linked to inadequate financial and technical resources available at the Member States level, and gaps in awareness and knowledge among the relevant stakeholders.

- Financial resource constraints

Some of the rights granted by the EU Directives, such as interpretation and prompt access to a lawyer, come with potentially significant financial burden. The relevance of cost implications was acknowledged in every impact assessment accompanying the Roadmap Directives. Academics (Baker, 2016, Ouwerkerk, 2017) have also illustrated examples of the potential high financial costs involved in the application of EU legislation in the criminal justice sphere, especially for safeguarding EU-level defence rights under the mutual recognition regime. Concrete experiences appear to support such initial concerns. For example, an interviewee recalled that the transposition of the Directive on translation and interpretation into German

law was not initially unsuccessful because of the financial burden caused by additional necessary translations. Fair Trials reported a case where, because of the lack of budget, a Pakistani defendant in France who did not speak French but only Urdu-Punjabi, had to wait for over 10 months in PTD for a translation (Fair Trials, 2017).

In many cases, the low quality of interpretation and translation is direct consequence of a lack of budget. In practice, Member States often outsource the recruitment of interpreters to outside agencies, which may lack transparency as to the qualification of the people recruited (CCBE, 2016b).

Resources are also one of the driving factors in reducing the number of documents translated, often below the minimum requirement of the Directive. For example, in Hungary since 2015, as a consequence of the refugee crisis and the large influx of rare-language speakers, new provisions were adopted and authorities are not obliged to translate the court decision but only to explain it orally during the trial through an interpreter (CCBE, 2016b).

With regards to the right of access to a lawyer, time and resource constraints are noted as the main causes of an effective participation of the defence, especially in legal aid cases. In Spain, for instance, legal aid lawyers receive only €150–€350 for representation from PTD to sentencing, making it difficult for legal aid lawyers to dedicate sufficient time to developing effective challenges to PTD (Fair Trials, 2016e). Difficulties of funding also prevent the establishment of an on-call duty system or a rota system for lawyers in many Member States, with the direct consequence of limiting extensively the right of access to a lawyer (CCBE, 2016b). The scarcity of financial resources might also affect the communication with the legal counsel; courts wish to minimise the expense arising from interpreting services and so limit the frequency or the duration of meetings between lawyers and their clients (CCBE, 2016b).

- **Awareness and training of practitioners**

The other main cause for the gaps that emerged from the interviews relates to the gaps in awareness and training among practitioners and relevant stakeholders. One interviewee specifically noted that legal practitioners can find it difficult to orient themselves among the proliferation of existing European and international legal texts. Along similar lines, another interviewee pointed out that the number of professionals who are trained in European and international law in each Member State is very small as the vast majority were hired to practice primarily national law. Some supporting evidence for the point made by our interviewee comes from data from the EU Justice scoreboard, which shows very different rates of participation by judges in continuous training activities in EU law or in the law of another Member State (EC, 2017b).²⁶⁹

FRA's research also shows that criminal justice professionals with low awareness of the specificities of working with legal interpreters and translators in criminal proceedings have difficulties using their services effectively. Moreover, lawyers are rarely able to assess quality unless they speak the same language as the suspect or, in extreme cases, where the interpreter provides unlikely responses or fails to answer control questions correctly (Fair Trials, 2016d, Figure 40 p. 29).

²⁶⁹ The data are limited in that some Member States are shown as having more than 100% of judges participating in this training, because some attended more than once. While the data are limited in giving an indication of the actual percentage, they are useful in showing the differences between Member States.

Lastly, police behaviours are also mentioned as one of the recurring causes for hindering the right to information (CCBE, 2016b) and the right to access a lawyer (Fair Trials, 2017).

EU funding for judicial training

Figures from the 2016 European Commission report on European judicial training highlights that, in 2015 alone, the EU co-funded the training of more than 25,000 legal professionals.

The European Commission, in 2011, set an aim of training 700,000 legal practitioners and that this should be supported with EU funds for at least 20,000 legal practitioners per year by 2020.

The European Judicial Training Network (EJTN) received the greatest amount of financial support by the European Commission in 2015. In addition, operating grants to support their training activities were also awarded to the Academy of European Law (ERA) and the European Institute of Public Administration (EIPA), the European Union Intellectual Property Office, the European Patent Office, the European Asylum Support Office and the European Police College, to a lesser extent. Moreover, EU grants were also awarded through the European Commission's Justice programme in the areas of civil and criminal justice, fundamental rights and competition law; the Rights, Equality and Citizenship Programme (REC); Hercule III; and the European Social Fund. Finally, the Commission has also contracted judicial training courses on EU law.

The Commission intends to continue supporting judicial training in areas where 'EU funds have a clear added value'. Based on recommendations from studies, such as the Pilot Project On European Judicial Training and the Commission's Expert Group On European Judicial Training, 'the Commission is looking into how to shift its financial support under the Justice programme in 2017 towards helping to support structural needs' and bolster European judicial training. The Commission suggests that action grants could be utilised to support, for example, the following:

'Strengthening sustainable cross-border cooperation of training providers for legal including private training providers in the cross-border cooperation for the legal professions where they play an important role, supporting the mutual recognition of training abroad to fulfil national training obligations'

'Provide linguistic support in cross-border training activities'.

Some of these issues are being addressed by the HELP in the EU project. HELP in the 28 is EU-funded and the 'largest training project within the EU on fundamental rights for judges, prosecutors and lawyers' at €1.6 million. The project is designed to support judicial professionals in EU Member States gaining knowledge and skills with regard to the CFREU, the ECHR and the ESC. The Commission website reports that around 750 legal professionals had benefitted from the programme, while another 2,015 had participated in seminars organised by the programme.

4. Source: EC, 2016b, Council of Europe, 2017e, EC, 2017h.

X – Coherence of the Directives

After an unsuccessful attempt to adopt a Council FD covering a range of procedural rights in criminal proceedings,²⁷⁰ EU measures on procedural rights and detention conditions have instead been passed in the six Directives, each relating to a particular procedural right. There is a risk inherent in this approach in that there is duplication, gaps or incoherence between the different legislative instruments adopted, and the 2014 European Council communication on the EU Justice Agenda for 2020 called for an examination of the need to codify criminal

²⁷⁰ In April 2004, the European Commission presented the 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union'. The text was amended by the EP in 2005 but it was never further developed. After lengthy debates at the Council that lasted several years, the proposal was finally withdrawn by the European Commission in 2009 following the entry into force of the Treaty of Lisbon. The main barrier to adopting such Council FD came from the opposition from certain Member States (CZ, IE, MT, SK, UK), as they considered that these rights were sufficiently protected by Articles 5 and 6 of the ECHR (Jimeno-Bulnes, 2009).

procedural rights into one instrument to further strengthen the level playing field and the consistency of the protection of the rights of suspected persons (EC, 2014b).

Some non-significant issues related to the coherence of the Directives have been identified by the research team based on an analysis of the texts. These are highlighted in the box below and could possibly be taken into account as part of the examination called for by the Commission. An interviewee also noted that one possible barrier to implementation of existing law by legal professionals is their confusion by the multitude of existing legal texts and uncertainties of how to apply those in a coherent manner. At the same time, another interviewee was concerned by any attempt to amend the Directives, for fear that it resulted in reduced procedural rights protections. Overall, interviewees did not identify coherence between the Directives as a major barrier to the protection of procedural rights.

Potential instances of the coherence of existing Roadmap Directives

The special needs of vulnerable persons are not recognised in a consistent manner. While some Directives²⁷¹ introduced a general reference to the obligation to take account of the special needs of vulnerable persons in the operative part of the text, others²⁷² deal with this in the Recital (i.e. soft law). Moreover, the definition of vulnerable persons is not always included in the Recital.

Lack of a common approach to establishing remedies against the violations of the rights covered by the Directives. Three Directives²⁷³ include general statements obliging Member States to provide effective remedies in the event of a breach of the rights covered therein, while two Directives introduced more specific guidelines.²⁷⁴ The first Directive adopted²⁷⁵ did not foresee any remedies.

Room for further consistency with regard to the right to be provided with a letter of rights in a language that the detained person understands. Directive 2013/13/EU on the right to information provides that Member States shall provide a suspect or accused person who has been deprived of liberty with a written version of the letter of rights in a language that he or she understand. An oral translation may be provided if the document is not available in a language that the suspect or accused understands, but nonetheless, a written translation must be provided without delay. However, Directive 2010/64/EU on the right to interpretation does not list this document as one of the essential documents (Article 3(2)).

Differences in the wording of the Articles excluding minor offences from the scope of application. With the exception of Directive 2016/343/EU on the presumption of innocence, minor offences have been left out of the scope of the procedural rights Directives. However, while minor offences are defined by most of these Directives as those for which sanctions are imposed by 'an authority other than a court having jurisdiction in criminal matters and the imposition of such sanction may be appealed to such a court', Directive 2013/48/EU completed this definition by adding 'or when deprivation of liberty cannot be imposed'.²⁷⁶ It should be examined whether further alignment of these Articles would be advisable.

Lack of a consistent language across Directives. Minor differences in the wording of some of the Articles establishing the scope of these Directives have been identified. However, it is unlikely that these will lead to inconsistencies in the application of the Directives:

'Criminal proceedings'. While all the Directives state that the rights protected therein should be applied as interpreted by the ECtHR, only Directive 2016/343/EU on presumption of innocence explicitly refers to the definition of criminal proceedings as interpreted by the CJEU.
'Point of charge'. The application of the first three Directives is triggered when the suspect or accused

²⁷¹ Directive on the right to information, Directive on the right of access to a lawyer and Directive on the right to legal aid.

²⁷² Directive on the right to interpretation and Directive on the presumption of innocence.

²⁷³ Directive on the right to information, Directive on procedural safeguards for children in criminal proceedings and Directive on the right to legal aid.

²⁷⁴ Directive on the right of access to a lawyer and Directive on the presumption of innocence.

²⁷⁵ Directive on the right to interpretation and translation.

²⁷⁶ The introduction of this sentence is the result of a request made by Luxembourg during the negotiation, as in that country even minor fines are imposed by criminal judicial authorities.

is made aware that he or she is suspected of having committed a criminal offence. However, while two of these Directives²⁷⁷ specified that the suspect could be made aware of this ‘by official notification or otherwise’, the third Directive²⁷⁸ omits these terms. Although in practice the obligation to comply with ECtHR case law leads to the conclusion that the scope of these measures should be considered the same, (Cras and De Matteis, 2013b) it could be discussed whether a more uniform approach could ensure more legal certainty. One interviewee also highlighted this discrepancy as an example of inconsistency among the Directives

5. Source: analysis by the research team

XI – Roadmap provisions not yet subject to EU legislation: pretrial detention

There are some aspects of procedural rights that were listed in the 2009 Roadmap but that are currently not covered, or not fully covered, by the existing EU legislation. This is the case of measure E of the 2009 Roadmap (Special safeguards for suspected or accused persons who are vulnerable) and measure F (a Green Paper on pretrial detention). As explained above, measure E of the Roadmap has only been partially addressed; although a Directive on procedural safeguards for children and a Recommendation on procedural safeguards for vulnerable adults were adopted, the research pointed out that there is a need for putting measure E into practice. Measure F of the Roadmap has been addressed since a Green Paper was published in 2011. Nevertheless, legislative action on PTD has lagged behind the rest of the Roadmap; the ESO has been the only EU instrument aimed to deal with PTD. EU and international institutions claimed that common standards on PTD are necessary to protect the fair trial rights of accused persons and to strengthen the mutual trust between European judiciary.

- Background

PTD is when a person suspected or accused of a crime is held in custody awaiting trial. While the creation of the ESO is intended to reduce the use of PTD, there are currently no EU measures specifically for PTD,²⁷⁹ although there have been calls for EU action.²⁸⁰ There is extensive ECtHR case law on PTD setting out the required preconditions and procedural rights. The aspects of PTD covered in the ECHR (Article 5) and the jurisprudence of the ECtHR is outlined in the box below.

PTD – aspects addressed by ECHR and ECtHR case law

Preconditions

The requirement of reasonable suspicion
Applicable grounds for imposing PTD (risk of absconding etc.).

Procedural rights

PTD should be a measure of last resort
There is a duty to consider alternatives

²⁷⁷ Directive on the right to interpretation and Directive on the right of access to a lawyer.

²⁷⁸ Directive on the right to information.

²⁷⁹ FD 2009/829 on the application of the principle of mutual recognition to decisions on supervision measures (FD ESO – discussed in Chapter 2) has some relevance, since the ESO can form an alternative to PTD. The Roadmap noted that there was a great deal of variation in the length of PTD between Member States and that this infringed rights and could harm judicial cooperation (Council of the European Union, 2009). The EP has at several points called on the Commission to propose new laws, most recently in a 2016 resolution (EP, 2016) as have Fair Trials International (2016e).

Decisions about PTD should be reasoned and made by a judge
 There should be regular review of PTD
 There is a right to a hearing in person to make decisions about PTD
 The right to appeal the imposition of PTD
 The maximum time permitted for PTD
 Deduction of time served on PTD from final sentence
 The right to an effective remedy if there is a breach
 Compensation for PTD if acquitted

Source: Council of Europe, 2014, Van Kalmthout et al., 2009b.

Building on the 2009 Roadmap, the European Commission published a Green Paper in 2011 on the application of EU criminal justice legislation in the field of detention to strengthen mutual trust in the European judicial area (EC, 2011d). Part of the Green Paper dealt explicitly with the issue of PTD, and in particular the length of PTD and the regular review of the grounds for PTD/statutory maximum periods. The Green Paper offered to the Commission the possibility to assess whether legally binding rules, for example EU minimum rules on regular review of the grounds for detention, would improve mutual confidence. The Commission received a total of 81 replies to the Green Paper from national governments, practitioners, international organisations, NGOs and academics (EC, 2011a). A summary analysis of the replies linked to the issue of PTD is set out below.

A large majority of Member States indicated that the implementation of FD ESO should be assessed before developing new legal measures in this area. Only three Member States called for an EU instrument promoting alternatives to PTD. Two Member States raised concerns about EU competence in this area and relied upon the principle of subsidiarity. Poland indicated that the EU is not competent regarding the unification of alternatives to PTD supervisory measures, while Denmark stated that there is no need for EU promotion to increase the use of these measures in light of the principle of subsidiarity. On the other hand, non-legislative initiatives, such as the exchange of best practices, would be welcomed by the respondents.

International organisations, NGOs and professional associations pointed out the importance of alternatives to PTD and reported to welcome the promotion of alternatives to PTD at EU level, such as promotion of the CoE Recommendations, training sessions and funding projects that deal with alternatives to PTD. Nevertheless, they also raised possible obstacles that may hinder the use of non-custodial measures mentioned, such as the fact that some of them are not available in a significant number of Member States

NGOs and professional associations raised concerns about an overuse of PTD by national courts and regretted the limited use of non-custodial measures across Member States. They indicated that PTD is often automatic and that many judges are not willing to use alternative measures. Moreover, regular reviews of continued detention, required by nearly all domestic systems, are often a simple formality rather than being an effective safeguard against unjustified PTD.

- Gaps

In practice, the required preconditions are rarely met and procedural rights are often not respected. Research has found gaps in the extent to which PTD rights are respected in practice across the EU.²⁸¹

²⁸¹ Sources reviewed for gaps in practice: Fair Trials, 2016e, EC, 2011a, Van Kalmthout et al., 2009a, Cape, et al, 2010.

PTD is not used as a last resort and alternatives are under used. Data shows the widespread use of PTD. As the CoE White Paper on prison overcrowding pointed out, the problem of high use of detention is closely linked to the functioning of the national criminal justice systems and its underlying traditions (Council of Europe, 2016). Overall, a review of previous research indicates that PTD does not appear to be used only as a matter of last resort and alternatives to PTD are underused (Fair Trials, 2016e). While, as the CoE pointed out, alternatives to PTD are available in the majority of Member States, courts do not avail themselves of these options very frequently. Possible reasons (barriers) for this situation may stem from pressure from the public and fear of crime (Council of Europe, 2016). This picture is confirmed by analysis building on available Council of Europe Annual Penal Statistics (SPACE), which found that the introduction of alternatives to PTD have resulted in only small, if any, decreases in the use of detention (Aebi et al., 2015).

PTD imposed on the basis of severity of alleged offence. One way in which practice has been found to depart from ECHR standards is that that length of sentence available for the alleged offence and the severity of the alleged crime have been found to be important determinants of the use of PTD in practice, which is against ECtHR case law.

Reviews of PTD are absent, infrequent or cursory, and limits on the length of PTD vary. Most Member States have a requirement to review the imposition of PTD (and a right to appeal), but reviews rarely result in a decision being changed and appeal processes differ between Member States. There are differences between Member States as to whether a maximum time limit for PTD is set, how long it is, and the discretion afforded to decision makers. Not all Member States require by law that time spent in PTD is deducted from sentence and there are different approaches to compensation. Also, in some countries, the law provides for automatic use of PTD in the case of repeat offenders.

PTD is disproportionately used against non-nationals and non-residents. There is evidence that non-residents are at risk of being disproportionately subject to PTD. On average, some 25 per cent of all prisoners in CoE Member States have not yet received a final sentence, according to the SPACE; for foreign nationals, this proportion is significantly higher (around 40 per cent) (Council of Europe, 2017c). Previous research (EC, 2011a, Fair Trials, 2016e) drew attention to the situation of non-nationals, who are often considered a higher flight risk, and thus they are remanded in custody for longer period than nationals awaiting trial. This creates a possibility of discrimination against non-resident EU citizens, which is in contravention of Article 18 TFEU (as mentioned in Chapter 1). As noted in Chapter 2, the FD ESO aims to provide options for alternatives to PTD exactly to those that are normally refused bail on account of having been deemed a flight risk due to a lack of ties to the Member State where the charges originate (EC, 2006b). However, calls for EU action have been made on the basis that ECtHR decisions are not a sufficient tool or mechanism to protect rights and that the current system runs the risk of jeopardising the rights to non-discrimination (EC, 2006a).

XII – Chapter summary, key findings and synthesis of gaps

In 2009, the Council endorsed a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ('the 2009 Roadmap') and invited the Commission to submit proposals for specific legislative measures. This process has so far resulted in six Directives relating to:

- The right to interpretation and translation in criminal proceedings (2010/64/EU).
 The right to information in criminal proceedings (2012/13/EU).
 The right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (2013/48/EU).
 The presumption of innocence and the right to be present at trial in criminal proceedings (2016/343/EU).
 Procedural safeguards for children who are suspects or accused persons in criminal proceedings (2016/800/EU).
 Legal aid for suspects or accused persons in criminal proceedings (2016/1919/EU).

There is also a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

Table 3 lists the gaps identified in the subsections of this Chapter. To facilitate analysis, the research team has clustered the gaps and barriers into nine categories:

- RM 1. **Costs incurred to suspects and accused persons.** A number of the gaps related to a situation where a suspect might be charged (for example, for copies for information).
- RM 2. **Extensive grounds for refusal/derogation.** These are gaps where the Directive or national implementation allows for many situations in which the duty to provide for the right does not apply.
- RM 3. **Ineffective remedies.** Gaps related to the lack of ability to appeal or claim compensation for lack of protection of rights.
- RM 4. **Gaps in EU legislation.** These are gaps where the cause is the scope or coverage of legislation. It includes instances, such as PTD, where there is no EU legislation, and situations where Directives have been criticised for not covering a wide enough scope
- RM 5. **Actions are non-binding.** These are gaps related to the recommendation on procedural safeguards for vulnerable adults
- RM 6. **Implementation means rights are not protected in practice.** This category includes a larger number of gaps than the others. All of the gaps here are examples where the way in which the safeguards or measures are implemented in practice does not match expectations in the Directives, or does not, in practice, protect the rights. It includes gaps relating to the quality of services, such as legal aid and translation, and the timeliness of the protection, such as the provision of the Letter of Rights.
- RM 7. **Lack of practitioner knowledge.** This is a cross-cutting barrier, relevant to many gaps.
- RM 8. **Variation between Member States in implementation.** Gaps where the Directive leaves scope for Member States to decide on matters, resulting in different practices in different Member States.
- RM 9. **Member States' financial constraints.** This is a cross-cutting barrier, relevant to many gaps.

■ Table 3: Categorisation of the gaps and barriers relating to the Roadmap measures

		Costs incurred to suspects and accused persons	Extensive grounds for refusal/derogation	Ineffective remedies	Gap in EU legislation	Action is non-binding	Implementation means rights are not protected in	Lack of practitioner guidance knowledge	Variation between Member States in	Member States' financial constraints
Cross-cutting barriers	Awareness and training of practitioners							✓		
	Financial resource constraints									✓
Interpretation and translation	Different approach to essential documents for translation: some Member States do not list them, some Member States have a limited understanding of what counts; and due to budget and time constraints, oral rather than written translations are provided								✓	
	Inadequate quality of translation and interpretation						✓			
	Lack of safeguard for the confidentiality of communication between suspected or accused persons and their legal counsel when using interpreters				✓					
	Lack of systematic approaches to ascertain the necessity of translation/interpretation								✓	
	Not all Member States have included a legal right both to challenge a decision and complain about quality; and some Member States provide ineffective remedies: not often interpreter/translator will be replaced if quality is challenged				✓					
Legal aid	Inconsistent eligibility test in the EAW				✓					
	Lack of application to people who are not deprived of liberty				✓					
	No provision of emergency legal advice				✓					
	The cost of providing legal aid may inhibit implementation	✓								
Presumption of innocence	Application to natural persons only				✓					
	Directive does not reflect requirements of the ECHR and its case law				✓					
	Lack of application to people who become suspects during an investigation				✓					

	Possible creation of perverse incentives to plead guilty							✓			
Right of access to a lawyer	Advocacy is often passive or non-existent due to financial compensation and workload							✓			
	In some Member States there are limits to the role permitted to lawyers during questioning of suspects		✓								
	The scope of the derogations is overly broad and open to abuse		✓								
	Waiving the right of access to a lawyer							✓			
	Weak remedies			✓							
Right to information	Challenges, difficulties and differences in accessing the materials, and in the timing for individuals already in detention							✓			
	Costs	✓									
	Extent, format, communication and temporal scope of the rights are not consistent across the Member States									✓	
	Lack of safeguards for vulnerable individuals				✓						
	Letters of Rights do not always cover all the rights prescribed by the Directive							✓			
	Some Member States do not have a specific Letter of Rights for EAW, as prescribed by the Directive							✓			
	Some Member States seem to allow extensive grounds for refusal to access materials of the case at the pretrial stage		✓								
	The information provided is often not clearly understandable							✓			
	The letter of rights for suspects or accused persons who are arrested or detained are not always provided in a timely way (i.e. before questioning)							✓			
Safeguards for children	Complex issues are not addressed in sufficient details				✓						
	Relevant definitions are lacking				✓						
	The Directive allows derogation from the duty to provide an assessment		✓								
	The Directive does not apply to minor offences or non-criminal proceedings				✓						
	The Directive has no requirement of mandatory representation by a lawyer				✓						
	There are few provisions concerning the need for an adult to be involved in the proceedings				✓						
Vulnerable adults	Member States do not have detailed rules or guidance for practitioners							✓			
	The instrument is not binding						✓				
Pretrial detention	PTD is not used as a last resort; PTD imposed on the basis of severity of alleged offence; reviews of PTD are absent, infrequent or cursory and limits on the length of PTD vary; PTD is disproportionately used against non-nationals				✓						

	and non-residents										
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Chapter 4 State of play, gaps and barriers in relation to detention conditions

This chapter addresses the first research question (What is the current state of play and the corresponding gaps and barriers in European cooperation and action in the area of procedural rights?) in relation to ensuring standards of detention that are aligned with respect for fundamental rights.

I – Rules and standards for detention conditions

- Standards applicable to detention conditions

There are a number of accepted international standards applicable to the area of detention conditions. Several international treaties (the ECHR (Article 3), the CFREU (Article 4), the UN Convention on the Prevention of Torture (Article 16) and the ICCPR (Article 7)) include provisions prohibiting inhumane or degrading treatment or punishment, which may cover situations caused by inadequate detention conditions. The protections against inhumane treatment in the treaties are legally binding, although they do not specify which areas may give rise to such violations and it is up to Member States to make their own arrangements to ensure compliance.²⁸²

Other instruments²⁸³ also provide guidelines for Member States in relation to detention conditions, which touch on a multitude of aspects pertaining to situations of deprivation of liberty. The EPR articulate a set of standards and benchmarks for a variety of aspects of imprisonment, as summarised in the box below. The EPR, unlike the treaties listed above, go beyond simply stating that people deprived of liberty should not be mistreated and suggest that Member States have positive obligations to take certain steps in the areas highlighted below (Vermeulen et al. 2011). The EPR take the non-binding form of a CoE recommendation, although the fact that the ECtHR makes reference to the EPR affords them a ‘quasi-legal’ character.²⁸⁴

Areas covered by the EPR

Conditions of imprisonment: 1) admission, 2) allocation and accommodation, 3) hygiene, 4) clothing and bedding, 5) nutrition, 6) legal advice, 7) contact with the outside world, 8) prison regime, 9) work, 10) exercise and recreation, 11) education, 12) freedom of thought, 13) conscience and religion, 14) information, 15) prisoners’ property, 16) transfer of prisoners, 17) release of prisoners, 18) women, 19) detained children, 20) infants, 21) foreign nationals, and 22) ethnic and linguistic minorities.

Healthcare.
 Good order.
 Management and staff.
 Inspection and monitoring.
 Specific conditions for untried prisoners and for sentenced prisoners, respectively.

²⁸² Inadequate detention conditions can give rise to violations of other rights as well. These include, though are not limited to, right to family life, right to no punishment without law, and right to privacy.

²⁸³ This group includes international standards adopted by the UN: 1) Mandela Rules (general treatment of prisoners); 2) Beijing Rules (juvenile justice); and 3) Havana Rules (detention of juveniles). Also among the group of UN minimum standards, Tokyo Rules address non-custodial sentences.

²⁸⁴ See, for instance, a testimony by Vivian Geiran, Director of the Probation Service, Ireland, to the EP LIBE Committee, February 9, 2017 (Committee on Civil Liberties Justice and Home Affairs, 2017).

There is currently no EU legislation specifically addressing detention conditions, although the Directive on procedural safeguards for children lays down minimum rules with respect to detention conditions for children with a deadline for transposition of 2019.²⁸⁵ Where detention is imposed, Member States must take measures to ensure and preserve children's health, and mental and physical development. To this end, a medical examination by a specialised professional, availability of education and training (including special education), safeguards of the rights to family life and freedom of religion and separation from adult detainees are all required.

- **Monitoring and enforcement of standards**

An important part of the current state of play in relation to detention conditions in the EU is the range of mechanisms for monitoring and enforcement. We have selected the following as the most relevant in the context of this Cost of Non-Europe report.

CoE: Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The CPT represents CoE's most robust standing mechanism explicitly dedicated to the monitoring of detention conditions (Council of Europe, 2017a). The CPT examines compliance with the European Convention Against Torture through periodic site visits in individual Member States (approximately 18 visits a year). It conducts two types of visits, planned (with one visit to each country approximately every four years) and *ad hoc* inspections (designed for more serious situations). Following a country visit, the CPT prepares a country report, to which the Member State is expected to provide a response. The country reports are confidential until the Member State concerned approves its publication, which EU Member States generally do (Council of Europe, 2015). In the event a state fails to act on the Committee's recommendations, in accordance of Article 10 of the CPT Convention, the Committee may 'make a public statement on the matter'. No other follow-up mechanism is envisaged.

In addition to the CPT, CoE's SPACE statistics collect relevant indicators related to detention conditions and provide information on topics such as prison overcrowding and number of persons serving alternatives to custodial sentences.

UN: Committee against Torture (CAT) and Subcommittee on Prevention of Torture (SPT)

The CAT is tasked with monitoring the implementation of the UN Convention against Torture. Similarly to the UN's Human Rights Committee (HRC), state parties are required to periodically (every four years) report on the implementation of the Convention's provisions, on the basis of which the Committee issues recommendations to individual states. The CAT also employs a follow-up procedure, which is structured similarly to that of the HRC.

In parallel, countries that ratified the Optional Protocol to the UN Convention Against Torture (OPCAT) are subject to a monitoring mechanism consisting of two components and is overseen by the SPT.

- 1) **Country visits by the SPT.** The SPT conducts periodic country visits to observe places of detention and meet with relevant authorities. On the basis of the country visits, the SPT

²⁸⁵ The deadline to transpose the Directive is in June 2019, precluding an assessment of its transposition at this stage. The Commission will submit a report on the implementation of this Directive in June 2022.

develops visit reports with recommendations, to which state parties are required to respond. As with CPT, SPT documents remain confidential until the state party in question consents to its publication (United Nations Human Rights Office of the High Commissioner, 2017b).

- 2) **National Preventative Mechanisms (NPMs).** Part IV of the protocol obliges parties to establish NPMs tasked with examining the treatment of detained persons and making associated observations, recommendations and proposals. The majority of EU Member States that are party to OPCAT have established the NPM as part of their national ombudsman offices, although a few countries have opted for a different approach.²⁸⁶ NPMs are expected to report annually to the SPT and their reports are made available on the SPT website.²⁸⁷

Together, the SPT, the NPMs and the governments of SPT members form a triangular relationship intended to ensure and facilitate communication and protection of detained persons (Council of Europe, 2016). The SPT alone possesses limited enforcement capabilities. In the event a state party refuses to cooperate with the monitoring mechanism, the SPT can request the CAT to make a public statement on the matter (similarly to the European CPT). In addition, the SPT can publish the country report without the consent of the state party. Taken together, the activities of the Committees inform the process of the United Nations Universal Period Review (UPR) (United Nations Human Rights Office of the High Commissioner, 2017c). Within that framework, continuous lack of cooperation on the part of a state party may result in action by the HRC.

II – Gaps in relation to adherence with standards of detention conditions

Detention standards frequently fall below prescribed standards, especially in relation to overcrowding. There is strong evidence from CoE data and a number of research studies that that detention conditions continue to fall short of required standards in numerous European countries. The issue of detention conditions has been repeatedly addressed by the ECtHR, which in 2016 alone found 194 violations related to inhuman and degrading treatment (Article 3 ECHR), of which 86 were judgments against EU Member States (Council of Europe, 2017d). Since 2013, the ECtHR issued four pilot judgments against EU Member States (Belgium, Hungary, Italy and Romania) in the areas of prison overcrowding,²⁸⁸ insufficient access to shower facilities and privacy when using sanitary facilities,²⁸⁹ and lack of mental health treatment.²⁹⁰ In addition to the pilot judgments, other cases have resulted in findings against individual Member States. Notable recent examples include *Mursic v Croatia* (2016) and *Lazar v Romania* (2017).

²⁸⁶ For instance, the French NPM is the General Inspector of Places of Deprivation of Liberty (Contrôle général des lieux de privation de liberté). The German NPS is the Federal Agency for the Prevention of Torture (Bundesstelle zur Verhütung von Folter) and Joint Commission of the Lander (Länderkommission zur Verhütung von Folter) (United Nations Human Rights Office of the High Commissioner, 2017a).

²⁸⁷ However, the documents made available so far do not cover systematically all years..

²⁸⁸ *Torregiani v Italy* (2013) *Varga v Hungary* (2015).

²⁸⁹ *Varga v Hungary* (2015)

²⁹⁰ *W.D. v Belgium* (2016)

Other manifestations of inadequate detention conditions in European prisons have been noted.²⁹¹ To illustrate, based on an analysis of prison conditions in eight Member States, the European Prison Observatory reported the following examples of deficiencies:

- Physical and mental health services are frequently inadequate
- Limited number of jobs available, often of poor quality and not always paid
- Vocational training is rarely an option for inmates
- Use of force and instruments of restraint by prison staff have been noted as issues of concern
- Inmates' ability to lodge complaints without fear of reprisals is not fully protected (Maculan et al., 2014).

Prison overcrowding is among the most frequently cited example of inadequate detention conditions in Europe (Council of Europe, 2016). According to the latest SPACE data, prison density per 100 spaces²⁹² exceeded 100 in four countries and in further six countries the density was higher than 90, which can be understood to indicate imminent overcrowding situation. However, the accuracy and reliability of these data is, perhaps, a gap in its own right, as explained in the box below,

Limitations to data on standards of detention

SPACE statistics rely on Member States' reporting, but countries use varied methodologies to calculate capacity and some do not have defined 'minimum space' requirements (as called for by the EPR).²⁹³ This is a gap in its own right, as it impedes the ability to monitor (and therefore challenge) overcrowded detention situations. The CoE's CPT monitors prison overcrowding utilising its own unified methodology and arrives at even higher estimates than the SPACE data. Accordingly, overcrowding is routinely highlighted in CPT publications. For instance, the 2016 CPT General Report stressed that overcrowding represented a 'serious problem', although it noted decreases in prison population in several countries.

6. Source: Council of Europe, 2016, CPT, 2016.

Lack of sufficient monitoring and enforcement of standards by the CPT. Two principal issues hamper the effectiveness of the CPT. First, existing resource constraints mean that the number of monitoring visits that can be undertaken is limited. The CPT can, and has regularly, undertake ad hoc monitoring missions. Still, the frequency of visits, along with their duration and depth, leaves room for further intensification of monitoring activities. Second, the CPT possesses relatively limited enforcement capabilities. The steps it can take in response to continued non-cooperation and non-compliance by Member States are largely declaratory.

Lack of sufficient monitoring and enforcement of standards by the SPT and NPMs. As with the CPT, one of the barriers to greater effectiveness of the SPT and NPMs are their limited enforcement options. In a study on the role of NPMs in preventing ill treatment, Tomkin et al. (2017) noted that NPMs have the potential to be a really important source of information (not least in the aftermath of *Aranjosi*, which highlighted the importance of judicial access to timely and accurate information). However, the authors identified several barriers to more effective functioning of NPMs. Namely, the majority of surveyed NPMs reported having no or almost no relationship with their respective judiciary systems. More than a third of judges surveyed for

²⁹¹ For instance, a 2016 CPT report highlighted the impact of prison overcrowding on conditions, regime, health care and violence (CPT, 2016).

²⁹² Prison density 'corresponds to the ratio between the number of inmates (including pretrial detainees) and the number of places available in penal institutions' (Aebi & Delgrande, 2013).

²⁹³ A similar point was made in the 2017 EP resolution on prison systems and detention conditions, stressing that this renders EU-wide comparisons difficult.

the study were unfamiliar with the NPMs. Still, those NPMs that did engage with their judiciaries reported this happened through a wide range of channels, ranging from report sharing, joint meetings and training sessions, and provision of expert opinions and evidence in court proceedings.²⁹⁴ Further, institutional and financial reliance of some NPMs on the government in their respective countries may also raise concerns about the degree of their independence and ability to carry out their mission.²⁹⁵

In addition, one interviewee suggested two possible factors limiting the effectiveness of NPMs. First, they are still relatively new institutions, suggesting they may take time before they become fully effective. Second, for some NPMs, detention conditions represent only one of many focal areas. At the same time, the interviewee added that NPMs are a potentially powerful tool to improve detention conditions that can provide valuable input to dialogues with politicians, policy makers and the general public.

III – Barriers to improved detention conditions

High use of PTD as a barrier and cause of overcrowding. The SPACE statistics indicate that the persistence of overcrowding is at least partly attributable to the high use of PTD and long durations of PTD, demonstrated by the high proportion of remand prisoners among overall inmate population (Aebi et al., 2017). This was also mentioned in the CoE's White Paper on prison overcrowding (Council of Europe, 2016), EP resolution on prison systems and detention conditions from 2017 (EP, 2017) and in the CPT's latest annual report (Aebi et al., 2017). The CPT report states that in many countries the persistent problem of overcrowding in prisons is due to a large extent to the high proportion of remand prisoners among the total prison population. In this context, the CPT has regularly identified serious shortcomings in the conditions in which pretrial prisoners are held in Europe (CPT, 2016): remand prisoners are all too often held in dilapidated and overcrowded cells; they are frequently subjected to an impoverished regime; and they are frequently subjected to various types of restrictions. The CPT has stressed that 'detention on remand can have severe psychological effects – suicide rates among remand prisoners can be several times higher than among sentenced prisoners – and other serious consequences such breaking up family ties or the loss of employment or accommodation' (CPT, 2016).

Some Member State penal policy and legislation encourages imprisonment rather than alternative sanctions. CoE's White Paper identified some root causes of overcrowding, including penal policies and legislation in Member States that place emphasis on imprisonment as a form of deterrent and limited use of alternatives to custodial sentences (although SPACE data indicate a gradual increase in the use of community sanctions). Greater use of alternative sanctions was also noted as a way of improving the management of prisons in the 2017 EP resolution on prison systems and conditions (EP, 2017).

Skills and capacity of prison staff. Two interviewees explicitly highlighted deficiencies in prison staff skills and attitudes in some countries. This observation is in accordance with wider evidence from prison research that the quality of prison life is to a large extent determined by relationships with staff in prison (Liebling et al., 2010) and that these staff are key gatekeepers to services and support. It is also in line with the observations made by national respondents

²⁹⁴ With respect to provision of oral evidence in court, Tomkin et al. (2017) noted that not all NPMs agreed this was appropriate for them to do.

²⁹⁵ For instance, the Association for the Prevention of Torture reported on these challenges in the context of NPMs being housed within National Human Rights Institutes.

surveyed by Vermeulen et al. (2011), some of whom highlighted staffing issues as one of the most pressing issues in their respective national prison systems (Vermeulen et al., 2011). In addition, in the same survey, international standards in the area of management and staff were among those least frequently reported to have been adopted by individual Member States. The importance of staff and staff training for the maintenance of good detention conditions was also stressed in the 2017 EP resolution on prison systems and conditions (EP, 2017).

IV – Chapter summary and key findings

There are a large number of international standards on detention conditions in international treaties and non-binding rules. This chapter described these standards and set out findings about the extent to which conditions of imprisonment and detention fall below these standards in the EU.

The following key gaps were found:

- DC 1.** Detention conditions continue to fall short of required standards in numerous Member States, with overcrowding being perhaps the most widespread problem.
- DC 2.** Limitations to monitoring by on the CTP: limited resources and limited enforcement.
- DC 3.** Limitations to monitoring by SPT and NPMs: limited enforcement, little awareness among judiciary, questions about independence from government, new institutions that are still establishing themselves, NPMs have many other commitments.

In relation to the barriers to improved detention conditions, the following were identified:

- High use of PTD as a barrier and cause of overcrowding
- Some Member State penal policy and legislation encourages imprisonment rather than alternative sanctions
- Prison staff skill and capacity.

Chapter 5 Assessment of impacts of the gaps in terms of protecting fundamental rights and freedoms

I – Introduction

Having mapped the gaps and barriers in relation to the mutual recognition instruments, Roadmap measures and detention conditions, this chapter looks at the impact of these gaps and barriers to address research question 2 of the study: What is the impact of these current gaps and barriers – in terms of the economic impacts and impact at individual level in terms of protecting their fundamental rights and freedoms? The focus of this study is on impacts at an individual level.

In this chapter each of the gaps identified in Chapter 2–4 are assessed as to their impact. Cost of Non-Europe reports aim, where possible, to include a quantitative assessment. However, it is often the case that the data needed for a quantitative assessment are not available, are not reliable or are not recent enough. All these challenges apply to this report. Therefore the assessment in this chapter is mainly qualitative. Further, the method of the qualitative assessment is slightly different for the mutual recognition instruments, Roadmap measures and detention conditions – again, depending on the evidence available to inform a qualitative assessment. As there are no data available on how commonly the gaps described in Chapters 2–4 are experienced, the qualitative assessment of the gaps looks at the likely effect of the gap if it were to arise in a particular case. A quantitative, costed estimate of impact was possible in relation to the cost of additional time spent in prison as a result of underuse of the FD TOP and the costs of PTD.

II – Assessment of the impact of the gaps in mutual recognition instruments

The research team were able to take two approaches to the impact assessment: a qualitative assessment of all of the gaps and barriers and a quantitative economic assessment of the impact of instances where underuse of the FD TOP results in a *de facto* prolongation of the individual's stay in prison. The method of impact assessment was dependent on the data available; data to support a quantitative assessment was only available for the specific effects of prolonging a prison stay.

- **Qualitative assessment of all gaps and barriers identified in relation to the mutual recognition instruments**

In order to explore the possible impact of the gaps identified in Chapter 2 on individuals, the research team employed an approach which started with agreeing a likely scenario for how each gap could likely impact in a particular case. This scenario was developed by the research team based on the evidence collected throughout the study. Of course, the actual impacts of the gaps would depend on the precise facts and context of each case, and a range of other scenarios are possible for each gap. The objective of the scenario-based assessment was to provide a starting point for understanding the possible, *relative* impacts at the individual level, and thus the gaps that are potentially the most harmful to fundamental rights.

Each possible scenario was then categorised according whether the gap or barrier constitutes:

A *de facto* erosion of the right. This is the case where the scenario suggested by the research team is likely to limit the protection of rights, but is not likely to result in a severe violation or complete denial of rights.

A *de facto* denial. This is the case where the scenario suggested by the research team is likely to result in a severe violation of rights.

The assessments were made by the research team, on the basis of the description of the gap, and was shared with the EAVA and expert advisors for challenge and comment.

In making the assessment the research team did *not* take into account how common the gap was (i.e. in how many Member States or cases), since data to support such an assessment are not available. We simply asked the question: in a case where this gap was experienced in this scenario, what would be the likely *de facto* impact on the individual?

The full assessment is found in Appendix A. This assessment indicates that almost all of the gaps identified are likely to lead to a *de facto* denial of the right. The gaps most likely to have the most significant impact at the individual level in terms of fundamental rights are:

Risks of a *de facto* deterioration of prisoner's situation in relation to FD TOP.

Not all Member States include specific measures to protect vulnerable persons in relation to FD TOP.

Lack of understanding and knowledge of the FD TOP among practitioners.

Concerns about potential disproportionality in the use of the EAW and EIO in minor cases.

Consent to a transfer is not always needed or is implied.

Procedures to ensure information, understanding and translation regarding transfer of persons are not specified in FD TOP, ESO and PAS.

Limited ability to refuse execution on fundamental rights grounds in all but the EIO.

Assessments of detention conditions needed for the EAW and TOP are rarely conducted and difficult in practice.

Underuse of ESO and PAS.

- **Quantitative and economic assessment of possible impacts of a *de facto* deterioration of a prisoner's situation following an incorrect application of FD TOP**

The availability of data about the cost of imprisonment allows some quantitative impact assessment of additional time spent in prison as a result of the underuse of FD TOP. A possible scenario imagined here, for example, would be when an inmate is transferred to a country with more stringent rules surrounding parole eligibility, this may result in a *de facto* prolongation of the individual's stay in prison. In other words, under certain circumstances, a transfer under FD TOP may cause a person to spend more time in prison than would have been the case in the absence of the transfer or in the event of its correct application.

While there are no data on the frequency of this situation occurring, nor on the length of the excess prison stay, it is possible to calculate the costs associated with an extra additional day of detention that result from the incorrect application of FD TOP. This is shown in Table 4 below. The numbers presented in the table capture costs per prisoner per day of detention. The quantification expresses the costs associated with 'excess' person/days in prison in terms of losses attributable to the individual due to lost income and property as well as costs attributable to the public due to expenditures on prison management. In doing so, the assessment builds on data collected and analysed in the course of the assessment of costs associated with PTD (see

section IV of this Chapter). The methodology is further explained in Appendix D. Owing to the fact there are no firm data on the number of instances this type of de facto deterioration of prisoner's situation occurs, we express these costs in terms of days. The results below show the costs associated with each excess day of detention.

The estimates in this table are not, in themselves, an assessment of the impact of longer sentences caused by the underuse of FD TOP. There are limited data available on the operation of the FD and we do not know how often its use might potentially prolong sentence. Instead these estimates are a *tool* that Member States and others could use to explore the potential impact (for the state and the individual concerned) of changes to the use of imprisonment.

■ **Table 4. Quantitative assessment: costs per day associated with a de facto prolongation of sentence following an incorrect application of FD TOP**

Member State	Prison administration/day	Earning loss/day	Average personal loss/day	Total cost/day
Austria	€ 113.0	€ 17.3	€ 1.3	€ 131.7
Belgium	€ 137.3	€ 18.0	€ 1.1	€ 156.5
Bulgaria	€ 13.7	€ 2.1	€ 0.6	€ 16.3
Croatia	€ 7.3	€ 4.9	€ 0.6	€ 16.6
Cyprus	€ 102.6	€ 14.5	€ 0.6	€ 117.6
Czech Republic	€ 45.0	€ 5.0	€ 0.6	€ 50.6
Denmark	€ 191.0	€ 18.1	€ 1.7	€ 210.8
Estonia	€ 39.4	€ 5.4	€ 0.8	€ 45.5
Finland	€ 175.0	€ 18.2	€ 0.8	€ 194.0
France	€ 102.7	€ 15.7	€ 0.8	€ 119.2
Germany	€ 129.4	€ 16.6	€ 0.8	€ 146.7
Greece	€ 28.2	€ 9.0	€ 0.2	€ 37.5
Hungary	€ 26.6	€ 3.3	€ 0.3	€ 30.2
Ireland	€ 189.0	€ 17.2	€ 1.5	€ 207.8
Italy	€ 141.8	€ 13.1	€ 0.5	€ 155.4
Latvia	€ 22.6	€ 3.7	€ 0.2	€ 26.6
Lithuania	€ 16.1	€ 3.5	€ 0.8	€ 20.4
Luxembourg	€ 206.5	€ 23.8	€ 0.6	€ 230.9
Malta	€ 102.6	€ 9.7	€ 0.6	€ 112.8
Netherlands	€ 273.0	€ 20.8	€ 0.8	€ 294.5
Poland	€ 22.5	€ 4.1	€ 0.6	€ 27.1
Portugal	€ 41.2	€ 8.1	€ 0.2	€ 49.6
Romania	€ 19.8	€ 2.5	€ 0.3	€ 22.6
Slovakia	€ 39.4	€ 4.6	€ 0.4	€ 44.4
Slovenia	€ 60.0	€ 7.2	€ 0.8	€ 68.0
Spain	€ 59.7	€ 12.1	€ 0.5	€ 72.3
Sweden	€ 354.0	€ 18.9	€ 3.0	€ 375.9
United Kingdom	€ 117.7	€ 19.6	€ 1.5	€ 138.8
EU average	€ 99.2	€ 11.3	€ 0.8	€ 111.4

Source: Analysis by the research team

III – Assessment of the gaps relating to the Roadmap measures

In relation to the gaps identified in the Roadmap measures, the research team were able to undertake a qualitative assessment, similar to that taken to the gaps in relation to the mutual recognition instruments, in which we articulated a likely scenario for each gap, thinking about how it was most likely to impact in a particular case. Each possible scenario was categorised

according to whether the gap or barrier constitutes a *de facto* erosion of the right, or whether it is a *de facto* denial.

As with the mutual recognition instruments, in making the assessment the research team did *not* take into account how common the gap was (i.e. in how many Member States or cases), since data to support such an assessment are not available. We simply asked the question: in a case where this gap was experienced, what would be the likely *de facto* impact on the individual? The same limitations apply as in section II: the same gap could have quite different consequences for individuals, depending on their circumstances, needs and the particulars of the case. As discussed in Chapter 3, there is no systematic empirical evidence about the impacts of the identified gaps and it is not known how many individuals across the EU, for example, were assigned an interpreter of poor quality, or were not granted adequate legal aid. Again, the assessment is intended to provide a starting point for understanding relative impacts at the individual level.

The full assessment is provided in Appendix C. Overall, the finding from the assessment is that that it is likely, in the scenarios suggested by the research team, that the identified gaps could have a significant impact at the individual level, in terms of protection of fundamental rights. Key gaps that were assessed as likely giving rise to a *de facto* denial of rights, and thus are considered high impact, are as follows:

Gaps in EU legislation could result in situations where suspected or accused persons were completely denied a right because, for example, the scope of the Directives did not cover their situation, the Directive fell below the standards in the ECHR, etc.

Extensive grounds for refusal/derogation/or limits to rights also emerged as potentially high-impact for individuals.

Challenges at the level of implementation could mean that, in effect, suspected and accused persons are not able to exercise their rights at all.

Variation between Member States. Where the Directives left issues to be decided at the Member State level, also were foreseen in the suggested scenarios to result in a *de facto* denial of rights.

Particularly in relation to vulnerable adults, the **non-binding nature of the Recommendation** could easily result in lack of protection and this could have an impact on individuals.

IV – Assessment of impacts of gaps related to PTD

The availability of some data about levels of PTD in Member States, as well as some other statistical and cost data about imprisonment, allowed the research team to take a quantitative approach to the assessment, in which we estimate the total cost of PTD across Member States and estimate how this might change under a number of scenarios.

- Qualitative assessment, based on the literature, of the effects on individuals of PTD

The reviewed literature provides a starting point for assessing the nature of the impacts, at individual level, on fundamental rights and freedoms.

The decision to detain an individual before he/she is found guilty threatens a fundamental right to liberty, and has potentially detrimental impacts on individuals, their families and communities. A person in PTD, whether guilty or not, immediately loses his/her freedom, and

PTD imposes direct costs to detainees, for example through inability to work, which may lead to loss of income and potentially the loss of employment altogether. In addition to the direct costs, detention may also impose costs which are harder to quantify, for example in the form of loss of liberty, dignity or damaged reputation (Pogrebin et al., 2001). Detainees could further be victims of violent acts while being incarcerated, with negative consequences for their physical and mental health and wellbeing (Abrams & Rohlfs, 2011).

PTD may also have a more severe impact on women, non-citizens, children and other vulnerable groups. For instance, in many countries women represent a small minority in the PTD population and their particular needs are often neglected (Open Society Justice Initiative, 2011, Hagan & Dinovitzer, 1999). Furthermore, as discussed previously, non-citizens or foreigners are often over-represented in the pre-trial prison population (CoE, 2017c) due to a lack of address, residence permit or language skills.

At a societal level, excessive pre-trial detention may undermine the rule of law, and exposing people who should be presumed innocent to overcrowded prison conditions, conditions which are in many instances worse than those of sentenced prisoners (Open Society Justice Initiative, 2011).

- **Quantitative assessment of the economic costs to Member States and detainees of PTD**

Previous impact assessments have shown that a PTD system is costly (EC, 2006b). A large proportion of the direct costs related to PTD stems from the cost of imprisonment (e.g. facilities, staff and administrative costs).²⁹⁶ In addition, as discussed above, PTD may also lead to indirect costs to society that are harder to quantify. For instance, the families of pretrial detainees may suffer, as PTD could deprive detainees' children of financial and emotional support, which could lead to higher rates of negative outcomes, such as antisocial behaviour and future criminal activities among these children.

While many of the impacts associated with PTD are hard to quantify in our assessment we looked at quantifying three different effects:

Cost to the public in the form of maintaining prison or PTD facilities, including subsistence costs, staffing and operational or administrative costs.

Individual loss of earnings and property due to loss of liberty while being held in PTD.

Costs to the public in the form of compensation paid for individuals wrongly subjected to PTD.

A limitation to this calculation is that the data on PTD is drawn from a number of datasets, each produced in different years, but this is the best data available that cover all Member States. As Table 5 shows, there is variation across the total number of people detained pretrial and the average number of days they spend in PTD across Europe. The full methodology of the impact assessment is presented in Appendix D.

■ **Table 5: Total cost of PTD across EU Member States.**

Member State	Number of pretrial detainees	Average number of PTD days	Total cost/day	Total cost (million)
Austria	1,848	68	€ 140.3	€ 17.6

²⁹⁶ See Appendix B for an overview of total spending on prison administration by each Member State.

Member State	Number of pretrial detainees	Average number of PTD days	Total cost/day	Total cost (million)
Belgium	3,314	80	€ 159.7	€ 42.3
Bulgaria	690	165	€ 64.0	€ 7.3
Croatia	719	165	€ 16.6	€ 2.0
Cyprus	97	165	€ 46.4	€ 0.7
Czech Republic	2,185	150	€ 51.9	€ 17.0
Denmark	1,383	55	€ 216.1	€ 11.1
Estonia	605	120	€ 45.8	€ 3.3
Finland	640	120	€ 195.4	€ 15.0
France	17,030	116	€ 109.4	€ 216.1
Germany	13,713	120	€ 149.0	€ 245.2
Greece	2,557	365	€ 39.9	€ 37.2
Hungary	4,400	364	€ 30.8	€ 49.4
Ireland	575	60	€ 212.6	€ 7.3
Italy	17,169	180	€ 158.3	€ 489.3
Latvia	1,376	365	€ 26.8	€ 13.5
Lithuania	942	120	€ 23.4	€ 2.6
Luxembourg	283	150	€ 234.3	€ 9.9
Malta	89	165	€ 41.1	€ 0.6
Netherlands	4,215	120	€ 278.6	€ 140.9
Poland	500	165	€ 28.7	€ 2.4
Portugal	2,330	365	€ 55.4	€ 47.1
Romania	2,588	270	€ 23.0	€ 16.1
Slovakia	1,363	213	€ 45.5	€ 13.2
Slovenia	231	120	€ 69.0	€ 1.9
Spain	8,636	180	€ 77.2	€ 120.0
Sweden	1,542	30	€ 429.7	€ 19.9
United Kingdom	10,724	60	€ 153.2	€ 98.6
EU average	3,634	165	€ 111.5	€ 58.8
EU total	101,744			€ 1,647.6

Source: Space I – Council of Europe Annual Penal Statistics (2015), also known as Aebi et al. (2016); European Commission (2006b); Criminal Justice data for 2015 provided by United Nations Office on Drugs and Crime (UNODC, n.d.).

Note: The number of pretrial detainees stems from UNODC data. The PTD length entries stem from the 2015 SPACE I database as well from the European Commission (2006) paper. For some countries, entries had to be imputed using the average length of PTD across all countries, as no official data could be retrieved for these countries. See Appendix D for more detail on the data and calculation of the cost estimates.

Taking into account the three different impacts as outlined above, we found that one day in PTD per detainee costs on average about € 115, with significant cost variation across Member States. Last year, more than 100,000 people have been held in PTD in the EU. The total cost of PTD, including the cost to the public related to running pretrial facilities (including prison) and compensations paid to individuals acquitted, as well as individual costs related to average income and property loss is about € 1.6 billion.

Ideally, one would want to be able to distinguish ‘appropriate’ use of PTD (imposed by due process with proper regard to the factors listed in Chapter 3 Section XI, above) from inappropriate or ‘excessive’ PDT. Unfortunately it is impossible to identify how much of the PTD in the EU is excessive as the data are not available to tell us who should and who should not have been subject to PTD, or for how long. In addition, the existing literature provides no clear indication on the extent of excessive PTD in Europe. While there is variation across Member States in the scale of PTD (i.e. share of pretrial detainees among prison population), which varies from 10 per cent (i.e. Bulgaria and Romania) to 40 per cent (i.e. the Netherlands and Luxembourg), as well as in the average length of time spent in PTD, the variation could be driven by various factors. For instance, these factors may include general cultural norms regarding criminal suspects or wider country-specific characteristics of the judicial system that may drive the scale and length of PTD (e.g. capacity or efficiency of courts), which are all relatively difficult to adjust and account for.

Therefore, in the absence of quantitative evidence about the level of PTD that is excessive, we articulate two scenarios to illustrate the extent of the overall cost of PTD that could be avoided if the current length and scale of PTD was reduced. To that end, we look at the following two scenarios in which the overall average duration of PTD and the level of individuals held in PTD are reduced to different extents:

Scenario 1: The average length of time spent in detention and level of individuals in PTD at any given point in time is reduced to the EU average. This assumes that length of PTD should not exceed more than 165 days and the proportion of individuals in PTD should not exceed 20 per cent of overall prison population. In practical terms, this scenario assumes that PTD length and scale above the EU average is ‘excessive’.

Scenario 2: The number of individuals held in PTD is reduced in each Member State by the average proportion of people on trial who are acquitted in a given country (see Table 5). The assumption behind the use of this measure is that it represents a proxy for how much PTD is imposed in situations that do not warrant it. The measure has its limitations; for example, not every acquitted person is held on remand. This measure also does not capture cases where a person is convicted after being held in PTD when they should not have been. However, in the absence of data on the frequency of these phenomena, the rate of acquittal represents a plausible measure of ‘excessive’ PTD.

Note that these scenarios serve for illustrative purposes to give a flavour how much of the overall cost of PTD could be reduced if alternative measures to PTD are taken. Table 6 includes the cost estimates for the two scenarios. For instance if all countries reduced the average length of PTD to the EU average (in length and scale), that would reduce to overall costs by about € 707 million. If all countries would reduce the current scale of PTD by their average estimated rate of acquittal, we estimate that this could reduce the cost by about € 162 million.

■ **Table 6: Total cost of PTD across EU Member States under different scenarios**

Member State	Number of pretrial detainees	Average number of PTD days	Total cost (million)	SC1 (above average to average)	SC2 (rate of acquittal)
Austria	1,848	68	€ 17.6	€ 17.6	€ 13.3
Belgium	3,314	80	€ 42.3	€ 40.0	€ 38.5
Bulgaria	690	165	€ 7.3	€ 7.3	€ 7.1
Croatia	719	165	€ 2.0	€ 1.9	€ 1.6
Cyprus	97	165	€ 0.7	€ 0.7	€ 0.7
Czech Republic	2,185	150	€ 17.0	€ 17.0	€ 16.0
Denmark	930	55	€ 11.1	€ 10.4	€ 9.7

Member State	Number of pretrial detainees	Average number of PTD days	Total cost (million)	SC1 (above average to average)	SC2 (rate of acquittal)
Estonia	605	120	€ 3.3	€ 3.3	€ 3.3
Finland	640	120	€ 15.0	€ 14.9	€ 14.8
France	17,030	116	€ 216.1	€ 203.8	€ 208.5
Germany	13,713	120	€ 245.2	€ 242.1	€ 222.9
Greece	2,557	365	€ 37.2	€ 19.1	€ 33.9
Hungary	4,400	364	€ 49.4	€ 25.8	€ 47.7
Ireland	575	60	€ 7.3	€ 7.3	€ 6.3
Italy	17,169	180	€ 489.3	€ 35.7	€ 444.8
Latvia	1,376	365	€ 13.5	€ 6.6	€ 13.3
Lithuania	942	120	€ 2.6	€ 2.6	€ 2.5
Luxembourg	283	150	€ 9.9	€ 7.7	€ 9.0
Malta	89	165	€ 0.6	€ 0.6	€ 0.5
Netherlands	4,215	120	€ 140.9	€ 109.3	€ 124.8
Poland	500	165	€ 2.4	€ 2.4	€ 2.2
Portugal	2,330	365	€ 47.1	€ 25.8	€ 36.5
Romania	2,588	270	€ 16.1	€ 6.2	€ 15.7
Slovakia	1,363	213	€ 13.2	€ 3.0	€ 12.5
Slovenia	231	120	€ 1.9	€ 1.9	€ 1.8
Spain	8,636	180	€ 120.0	€ 10.0	€ 99.9
Sweden	1,542	30	€ 19.9	€ 18.6	€ 18.1
United Kingdom	10,724	60	€ 98.6	€ 98.6	€ 79.7
Total			€ 1,647.6	€ 940.6	€ 1,485.8
Savings				€ 707.2	€ 161.8

7. Note: Authors' calculations. See Appendix D for more details regarding the calculations of different cost factors.

Note that scenario 1 is somewhat optimistic given it assumes that the length of PTD as well as the share of the population in PTD will converge to the current EU average. It requires relatively large changes in countries that report the biggest volume of use of PTD, which may take time to materialise. As such, however, the scenario may approximate a long-term objective in efforts to curb excessive use of PTD. By contrast, scenario 2 makes a much more realistic assumption, by assuming that current levels of individuals in PTD can be reduced by the average rate of acquittal. While imperfect and subject to limitations, this rate can conceivably serve as a proxy for those individuals who should not have been in PTD in the first place. As such, it can be considered to provide a more realistic measure of 'excessive' PTD. However, it is important to stress that both the reduction to the EU average, as well as the reduction by the current rate of acquittal serve as mere proxies for excessive PTD and should be used with caution due to their primarily illustrative nature.

V – Assessment of gaps relating to detention conditions

Chapter 4 identified that detention conditions continue to fall short of required standards in numerous European countries in relation to various aspects of detention. Having appraised the available information and data, the research team were able to approach the assessment of the impact of poor detention conditions in three ways:

A qualitative assessment, based on an analysis of ECtHR jurisprudence in respect of different aspects of detention.

A qualitative analysis that takes advantage of a previous study, which provides practitioner views on the impact of detention conditions that do not meet required standards.

A quantitative analysis which makes use of available data about prison overcrowding and inmate suicide.

The other gap identified in Chapter 4 related to limitations on monitoring of detention conditions by the CPT, SPT and NPMs. The assessment of these gaps is qualitative and narrative.

- **Qualitative assessment of the impact of poor detention standards, based on an analysis of ECtHR jurisprudence**

This assessment of the impact of inadequate detention conditions is based on ECtHR jurisprudence related to detention condition standards as set out in the EPR.²⁹⁷ To undertake this assessment the research team reviewed existing literature on relevant ECtHR jurisprudence,²⁹⁸ complemented by a search of the HUDOC database (which provides access to the case law of the ECtHR) to identify cases which referred to the EPRs.²⁹⁹

In the absence of other data that would allow assessment of how many individuals are detained in substandard conditions, looking at which of the standards of the EPR the ECtHR has found to have been breached provides one measure of where the most serious gaps lie. For the ECtHR to find that detention conditions amount to a violation of the Convention, the situation in question needs to have reached a certain degree of severity, so this provides one method for identifying the aspects of prison conditions that have the biggest impact at individual level in terms of protecting fundamental rights and freedoms. The full results can be found in Appendix E. Relevant ECtHR judgments were identified in relation to approximately half of EPR sections. An analysis of the findings by the research team indicates that the following are likely to have the highest impact on individuals in the EU:

Lack of respect for basic principles expressed in the EPR, such as that detainees should retain all rights not lawfully taken away by court decision, restrictions on liberty should be necessary and proportionate, and there should be facilitation of social rehabilitation.

Failures in relation to many aspects of the conditions of imprisonment, including lack of adaptations to disability, overcrowding, lack of sanitary conditions, insufficient diet, interference with legal correspondence, denial of rights to vote or maintain contact with the outside world, limited time spent out of cell and limited opportunities for education.

Lack of particular protection for children in detention, including lengthy detention of children in stressful settings and lack of healthcare for infants.

Lack of provision for physical health assistance.

Lack of protection for the safety of detainees, and failure to provide an environment in which detainees are without fear.

²⁹⁷ Typically, this jurisprudence involves findings of violations of Article 3 ECHR; however, other Articles (e.g. Article 8) may also be applicable.

²⁹⁸ The documents reviewed included 1) ECtHR briefings on its case law in the domains of detention conditions, detention and health, detention and mental health, detention and voting rights, detention and hunger strikes, and pilot judgments pertaining to detention conditions, 2) Overviews of ECtHR caselaw for 2014-2017, 3) Open Society Justice Initiative Case Digests, and 4) Commentary on Recommendation Rec (2006)2 of the Committee of Ministers to Member States on the European Prison Rules.

²⁹⁹ The search of the database was done using a combination of search terms involving "European Prison Rules" and individual categories of detention conditions, e.g. "hygiene" or "nutrition."

The behaviour of staff towards prisoners, for example, where members of staff do not respect the presumption of innocence and subject pretrial detainees to the same prison regime used for convicted individuals.

Of course, there are a number of limitations to using the existence of ECtHR judgements as an indicator of the most impactful threats stemming from poor prisons conditions:

The absence of an identified ECtHR finding may mean that an application that would meet the Court's test for severity has not been filed yet (e.g. the issue was resolved through national remedies).

A finding of an ECHR violation cannot be attributed to a single cause. In fact, the ECtHR explicitly notes that when assessing the severity of the situation, it takes a holistic view of the prisoner's circumstances and takes into consideration a multitude of relevant factors. This is reflected, for example, in relation to 'exercise and recreation' and 'transfer of prisoners.' In both instances, issues in these areas contributed to a finding of a violation, but no identified case has pointed at deficiencies in these areas as the sole cause of detention conditions that were deemed severe enough by the Court to constitute a violation. The Court's simultaneous consideration of multiple factors is also exemplified by its approach to minimum space requirements. According to the Court, lack of space can in itself result in a violation of Article 3 ECHR, but the Court has not specified a firm threshold that would automatically trigger such a result. It has ruled that personal space under three square metres is likely to constitute a violation, but this presumption is nevertheless rebuttable in the event of the existence of other compensatory factors (for example, if there is evidence that the detained person was able to undertake activities outside of cell).

Concrete cases and issues do not always lend themselves clearly to categorisation by EPR sections. For instance, while formally we have not identified an ECtHR judgment that would refer to EPR guidelines on management and staff, violations observed in some other areas stem at least partially from issues such as management and staff practices. A good example is the category 'good order,' which can subsume situations where fundamental rights violations result from staff behaviour and/or interventions. It would, therefore, likely be mistaken to interpret the absence of a relevant ECtHR case as indicative of relatively lower importance of staff and management practices. This is also in line with testimonies from several interviewees, who stressed the contributing role of staff (and staff skills and training or lack thereof) to detention conditions in European prisons.

Qualitative assessment of impact of poor detention standards, based on previous research into practitioner views

In research conducted in 2011, practitioners were asked about the severity of individual gaps in detention condition standards (Vermeulen et al., 2011). While these data are now several years old, the evidence presented in Chapter 4 indicates that the same challenges are still relevant today. Table 7 shows the number of national respondents who indicated a certain issue was among the top five, top three or was the most pressing challenge. These data from Vermeulen's research provide another way to identify the gaps that are likely to be having the highest impact on individuals in the EU. The results demonstrate that overcrowding was considered the most pressing issue. In addition to overcrowding, issues that were also noted as the most important in at least one country were hygiene, detention conditions applicable to vulnerable inmates and provision of re-entry services. Other frequently mentioned, although not necessarily seen as most important, gaps pertain to prison infrastructure and facilities, mental health services and availability of work for inmates.

■ **Table 7. Practitioner-based assessment of the severity of individual gaps in detention condition standards**

Gap	Named as top issue [number of countries]	Named in top three [number of countries]	Named in top five [number of countries]
Overcrowding (or risk thereof)	15	17	18
Infrastructure	3	10	12
Hygiene	1	4	4
Vulnerable prisoners	1	3	8
Re-entry services	1	1	4
Mental health services	0	9	13
Healthcare	0	5	6
Staff	0	4	7
Activities	0	3	4
Work	0	2	10
Good order	0	2	3
Education	0	1	3

Source: Vermeulen et al., 2011

Notes: Number of respondents totalled 23. Only issues mentioned by at least three countries included.

This approach to impact assessment is also subject to several limitations. First, the question used in the questionnaire was not worded explicitly asking about impacts on individuals. As such, some respondents may have interpreted it as referring to challenges associated with the management and operation of the country's prison system as a whole, which, while related, may not overlap perfectly with challenges faced by individual members of the prison population. Still, this assessment considers practitioners' responses as a proxy for an assessment of impacts on individuals on the assumption that the most pressing issues give rise to the most pressing impacts. Further, the testimonies on the severity of individual issues were provided by a limited number of individuals and do not represent an assessment made by an official authority (e.g. CPT).

- **Qualitative assessment of impact of poor detention standards, based on literature review, of the cumulative impact of poor detention conditions**

In assessing the impact of individual gaps in adherence to detention condition standards, it is necessary to keep in mind that individual issues and deficiencies (e.g. overcrowding) may give rise or exacerbate other challenges, thereby creating or perpetuating a self-reinforcing vicious cycle. A review of the literature adds to our qualitative understanding of the impact at individual level in terms of protecting detainees' fundamental rights and freedoms. In particular, the way that the different aspects of detention are closely linked.

For example, the 2017 EP report on prison systems and conditions noted safety of prison staff and prisoners, availability of activities and medical care for inmates, as well as monitoring of the prison populations, as examples of areas that can be negatively affected by overcrowding (EP, 2017a).

These mutually reinforcing linkages between individual gaps have been documented to lead to a range of knock-on effects. Existing evidence suggests that overcrowding and associated pressures on in-prison services can lead to deterioration of inmates' physical and mental health,

and can induce tension and violence as well as the transmission of communicable diseases.³⁰⁰ Especially vulnerable groups such as children, young prisoners, women and prisoners with mental health needs are at particular risk of being bullied or abused in overcrowded conditions (Hammett et al., 2001).

Conditions in detention may also create the need for people to engage in corrupt behaviour to ensure they have access to services and are treated the way they are entitled to (Open Society Justice Initiative, 2011). The Radicalisation Awareness Network (RAN) also identified overcrowding, poor facilities and lack of staff among factors negatively impacting anti-radicalisation (Radicalisation Awareness Network, 2017).

- **Quantitative assessment of the link between overcrowding and suicide in prison**

In addition to the qualitative impact assessments above, the availability of data on levels of overcrowding and one of the possible impacts of this (suicides in prison) meant that it was also possible to undertake a quantitative analysis of the potential relationship between overcrowding (measured as prison density above 90 or 100 per cent) and suicides in prisons. The full analysis and method are presented in Appendix F.

The results of our analysis show that one impact of overcrowding is higher numbers of suicides. Levels of overcrowding in European prisons are statistically significantly associated with higher levels of suicides in European prisons. In other words, countries with overcrowded prisons record a higher number of inmate suicides and the observed difference in the number of suicides, when controlling for other potential confounding factors, cannot be explained by random variation. This means that reductions in overcrowding in European prisons, all else being equal, can be expected to result in fewer suicides among inmates.

- **Narrative qualitative assessment of the impact of limitations on monitoring of detention conditions**

No data could be found to allow an empirical investigation of the impact of limitations of monitoring on individuals' fundamental rights. Therefore, the approach here is to highlight possible direct and indirect impacts.

One possible direct impact of the limitations on monitoring is that instances of violations of individual fundamental rights are not identified and thus cannot be challenged and rectified. Furthermore, weaknesses in existing monitoring frameworks (e.g. gaps in geographical coverage, frequency of visits etc.) may render it problematic to assess the extent to which an issue, once identified, represents a systemic challenge as opposed to a one-off infraction.

A second, indirect impact is that gaps in existing monitoring systems (and resulting poor quality data on the conditions of detention) can have a knock on effect on the functioning of mutual recognition instruments. In this regard, lack of good available data might manifest itself in at least two ways.

In some instances, individuals may be incorrectly transferred from one state to another because gaps in data omit grounds on which the transfer should have been refused.

An opposite situation is when a transfer is refused although all material conditions have been met. Such an outcome can plausibly occur in instances where gaps in monitoring

systems are unable to provide sufficient information about detention conditions in the executing country or to enable a verification of assurances provided before the transfer.

Chapter 6 Options for EU Action

This chapter addresses the third research question for this study: Are there potential options for action at EU level that could address the identified gaps and barriers and what are their potential costs and benefits?

Possible policy options addressing the gaps outlined in Chapters 2–4 were identified through the literature review and interviews and refined during workshops with expert advisors. The policy options can be grouped into five broad themes, with between two and four policy options in each. These are summarised in Table 8.

Policy Options 1 and 2 aim to improve, at a high level, the scrutiny and enforcement of fundamental rights standards, and this could impact across the range of gaps identified in this report. Policy option 3 focuses on the range of gaps that relate to implementation of existing EU legislation. Option 4 focuses on particular gaps in the mutual recognition instruments and Roadmap measures. Option 5 proposes specific steps to address PTD and conditions of imprisonment.

In this chapter, for each policy option, we set out: a) the gaps it might possibly address; b) a description of what the option entails; c) a summary of whether new legislation is needed and an assessment of EU competence to act; d) possible EU added value stemming from the option; and e) challenges and limitations to each option.

In our assessment of the EU added value associated with each option we follow the principles in the Better Regulation Toolbox (EC, 2017d), in particular the European added value test applicable in the subsidiarity analysis of a new initiative.³⁰¹ The added value test asks whether the objectives of the proposed actions can be better achieved at EU level. In other words, EU added value may exist if EU action is likely to yield greater benefits in comparison with action at the Member State level. Such benefit might stem from scale of effort or greater effectiveness and/or efficiency.

■ **Table 8: Overview of identified potential options actions at EU level that might lead to added value to the challenges**

Policy themes	Policy options
1.Ensuring better compliance with international obligations	1a. Pursue EU accession to the ECHR
2.Ensuring better compliance with EU values of democracy, rule of law and fundamental rights	2a. Undertake institutional changes to EU monitoring and enforcement mechanisms 2b. Provide support to existing monitoring mechanisms through soft measures 2c. Establish an EU monitoring system for rule of law, democracy and fundamental rights
3.Ensuring proper implementation of EU legislation	3a. Support the implementation of existing EU legislation through soft measures 3b. Enforce the implementation of EU legislation through existing mechanisms
4.Reviewing existing EU legislation to	4a. Amend existing mutual recognition instruments 4b. Amend existing Roadmap Directives

³⁰¹ Tool 3 in the Guidelines.

ensure better fundamental rights compliance	
5. Enacting additional EU legislation	5a. Expand the scope of existing EU legislation in the domain of procedural rights 5b. Introduce minimum EU standards on detention conditions

I – Ensuring better compliance with international obligations

- Option 1a: Pursue EU accession to the ECHR

This policy option potentially addressed all of the gaps and barriers identified in this study, since accession to the ECHR is intended, at a high level, to add more scrutiny of EU action, and to ensure consistent interpretation of fundamental rights standards between the EU and CoE.

Concrete steps that could be taken in this area:

- Pursue EU accession to the ECHR.

What would this option involve?

The EU, in line with the Article 6 of the TEU, is obliged to continue with its efforts to complete its accession to the ECHR. As one interviewee noted, one of the benefits of such a step would be helping to ensure a degree of coherence in the interpretation of fundamental rights. By having both main actors (i.e. the EU and the CoE) adhere to the same instrument, the risk of fragmentation of efforts and diverging interpretations in the area of human rights would be minimised. In addition, EU accession to the ECHR would mean that the EU could appear before the court (e.g. as a co-defendant) and would be able to exercise an additional level of scrutiny by directly participating in the monitoring of the execution of judgments of the ECtHR.

Does it require new legislation? Does the EU have competence to act?

The action needed is the conclusion of a new accession agreement between the 47 Member States of the CoE and the EU. Politically this is not an easy task. Legally, the EU is not only competent to conclude the accession agreement; the EU institutions are under an obligation to pursue accession (Article 6(2) TEU).

What is the possible EU added value?

The assessment of EU added value stemming from ECHR accession needs to examine possible benefits in comparison with the status quo. That is because there is no alternative action at the Member State level, as all EU Member States are already parties to the ECHR.

Assessments of the potential impact of EU's accession to the ECHR do not appear to be uniform, reflecting possible tensions between the principle of mutual trust and fundamental rights protections (Peers, 2014). For instance, Lazowski and Wessel argued that ECHR accession will contribute to a greater scrutiny and an overall coherent form of fundamental rights protection in the EU, preventing divergent interpretations by the CJEU and the ECtHR (Lazowski and Wessel, 2015). Importantly, accession could mean increased levels of external scrutiny may be applied also to EU mutual recognition instruments and their compliance with fundamental rights standards (Polakiewicz, 2016). However, this would necessitate a departure in ECtHR's approach, which has historically recognised the pre-eminence of the principle of mutual trust in EU law (Lenaerts, 2015). This is expressed in the Court's *Bosphorus* presumption,

under which the Court would undertake a review of Member States' implementation of EU law only where fundamental rights protections were 'manifestly deficient' (Johansen, 2016). The original draft accession agreement would discontinue this privileged position of the EU (Eckes, 2012), but was rejected in Opinion 2/13.³⁰² Correspondingly, Peers opined against the pursuit of the accession, at least on the terms defined in Opinion 2/13, as it would, in his analysis, carry the risk of actually reducing fundamental rights protection standards in the EU.³⁰³

Both interviewees who commented on the possible impact of EU accession expressed reservations about the likely effect. One interviewee expressed doubt it would have many tangible benefits. Another interviewee noted somewhat pragmatically that, while the accession to the ECHR probably remains the preferred course of action, the CoE and the EU are able to find other avenues of mutual cooperation and work around any delays or uncertainties surrounding the accession.

What are the possible challenges or limitations to this option?

In terms of executing the option above, EU accession to the ECHR continues to be uncertain, following Opinion 2/13 of the CJEU and the resulting need to redraft the accession agreement (Douglas-Scott, 2014; Halberstam, 2015). Nevertheless, the EU institutions have indicated continued interest in pursuing ECHR accession. Most recently, in a December 2016 resolution on the situation on fundamental rights in the EU, the EP called for a prompt resolution of outstanding legal issues surrounding the accession (EP, 2016a). Similarly, the Staff Working Paper (SWP) accompanying the Commission's 2016 report on the CFREU's application reiterated that ECHR accession continued to be a priority for the EU (EC, 2017e). According to the Commission, work is in progress on consultations with relevant parties on how to address the Court's objections to the draft Accession Agreement.³⁰⁴

II – Ensuring better compliance with EU values of democracy, rule of law and fundamental rights

- Option 2a: Undertake institutional changes to existing EU monitoring and enforcement mechanisms and options

Similar to Option 1, this option aims at improving, overall, the mechanisms available to EU institutions for monitoring and enforcement relating to serious and systematic fundamental rights violations.

Concrete steps that could be taken in this area:

- Strengthen the Commission's Rule of Law Framework by establishing definitions, benchmarks and criteria for individual decisions.
- Reform the Council's Rule of Law Dialogue by increasing topical focus and introducing peer review and follow-up mechanisms.

³⁰² In this context, Johansen noted that in 2016, i.e. after the publication of Opinion 2/13, the ECtHR reaffirmed the Bosphorus presumption in the first case concerning mutual recognition under EU law (*Avotiņš v Latvia*). At the same time, the judgment noted the existence of the possible tension between the application of mutual recognition mechanisms and fundamental rights.

³⁰³ The author acknowledged the fact that the accession remains a Treaty obligation. See Peers, 2015.

³⁰⁴ Also see summary by Manko (2017).

What would this option involve?

Several existing EU institutional frameworks provide routes to better implement and enforce procedural rights protections and improve detention conditions. Option 2a proposes changes to these frameworks in order to improve their effectiveness. In this regard, increased effectiveness of existing frameworks could have positive impacts extending beyond the areas of procedural rights and detention conditions, as well as beyond the implementation of EU law, since the frameworks covered under this option examine Member States' compliance with their general Treaty obligation to respect the rule of law.

Building on observations made by Kochenov and Pech (2015) and Pech and Scheppele (2017), the following action could be taken to improve the Commission's Rule of Law framework. The scope of the framework could be clarified, accompanied by definitions of what constitutes a 'systemic threat' and under what conditions the framework should be triggered. Further, particularly in light of what is perceived as selective use of the instrument (van Ballegooij and Evas, 2016, EP, 2017b), decisions surrounding the use of the framework would benefit from greater clarity and explanation. This could take the form of a systematic publication of relevant Commission opinions and relevant Member State responses. More fundamentally, the Commission could set criteria and conditions for the automatic triggering of Article 7 as a result of the framework procedure.

Similarly, reflecting assessments in existing literature and documents (EP, 2015, Oliver and Stefanelli, 2016)³⁰⁵ possible amendments can be made to the Council Rule of Law dialogue. These include reducing the number of topics under discussion, better reflecting existing UN and CoE recommendations, and introducing an effective peer-review element coupled with monitoring and follow-up mechanisms.

Does it require new legislation? Does the EU have competence to act?

No legislative action is needed. The Lisbon Treaty has brought EU criminal law within the ordinary enforcement mechanisms under the European Treaties. This includes a strong role for the Commission in monitoring and taking enforcement action if Member States do not give adequate effect to EU law. Specifically with respect to the Commission's rule of law framework, the Commission invoked its competence as 'guardian of the Treaties' (EC, 2014a). In its opinion, the Council Legal Service found the framework incompatible with Commission's competences (Council of the European Union, 2014). However, in light of the recent application of the framework in response to actions of the Polish Government, the Council appears to have recognised and expressed support to the role of the Commission (Council of the European Union, 2017).

What is the possible EU added value?

As with option 1a, EU added value associated with this option needs to be contrasted with the status quo as it explicitly refers to activities already ongoing at the EU level. Possible added value may arise from increased effectiveness of EU action in safeguarding fundamental rights in the EU.

³⁰⁵ See also research papers supporting this assessment: Bard et al. (2016) Pech et al. (2016).

What are the possible challenges or limitations to this option?

As above, it is not clear the pursuit of these options would have much meaningful impact on the situation surrounding fundamental rights in the EU. Concerning the Commission’s rule of law framework, its effectiveness is inexorably tied to whether there is an appetite to use the Article 7 procedure, which, as discussed in Chapter 1, carries high political and symbolic weight. The introduction of its automatic triggers into the design of the framework would remove at least some of the political dimension;³⁰⁶ however, the adoption of such triggers itself may represent a politically difficult step. Political sensitivities may exist surrounding the publication of ‘rule of law opinions’ for individual Member States. Making assessments public may inhibit the Commission’s ability to work with Member States to find a solution in a timely manner and to avoid any escalation of the issue (Pech et al., 2016). Finally, in addition to the question of political will, Article 7 procedures also face several institutional hurdles – any action requires a very high degree of support in both the Council and the Parliament. The fact that the EP called for the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (see Option 2c) is also a reflection of its belief that modifications to the Commission rule of law framework and the Council rule of law dialogue would not be sufficient to address the identified gaps (EP, 2016c) .

- **Option 2b: Provide support to existing monitoring mechanisms through soft measures**

This option particularly addresses the following gaps related to conditions of imprisonment through improving monitoring arrangements:

- DC 1: Detention conditions continue to fall short of required standards in numerous European countries, with overcrowding being perhaps the most widespread problem.
- DC 2: Limitations to monitoring by the CPT: limited resources and limited enforcement.
- DC 3: Limitations to monitoring by SPT and NPMs: limited enforcement, little awareness among judiciary, questions about independence from government, new institutions, many other commitments.

Concrete steps that could be taken in this area:

- Provide further financial and technical assistance to existing mechanisms, such as NPMs, and take steps to increase practitioners’ awareness of these data sources.
- Improve the understanding and assessment of root causes and frequencies of fundamental rights violations, e.g. through systematic deployment of CoE assessment tools to monitor practice in areas of interest such as PTD.

Provide guidelines and recommendations for increased data collection at the Member States level, including a set of common definitions.

What would this option involve?

Several options exist for the EU to provide support to existing monitoring mechanisms in the field of detention conditions, such as NPMs and CoE’s CPT. The EU may be in a position to improve coordination efforts among relevant monitoring bodies with the aim of preventing duplication of effort. In addition, the EU can continue and strengthen its efforts to provide financial assistance to external monitoring bodies. An example of such an effort is financial assistance to the CoE under the Commission’s Justice Programme for the SPACE report and an

³⁰⁶ Individuals cannot bring action under Article 7. CJEU Case T-337/03 of 2 April 2004, *Bertelli Gálvez v Commission*, ECR 2004 II-01041.

EU network of prison monitoring bodies, such as NPMs (EC, 2017c). One interviewee suggested more EU Member States should agree to have their respective CPT country monitoring reports published automatically.³⁰⁷ While reports on EU Member States are routinely published, there is typically a delay in the process, which, as the interviewee pointed out, precludes most recent data from being promptly available. Based on the comments by this interviewee, the research team suggests that the Commission encourage all Member States to provide this authorisation.

Specifically with respect to NPMs, Tomkin et al. (2017) noted that currently there is relatively little communication between EU institutions and the national bodies (and UN SPT more broadly). In line with the OPCAT, which foresees the role of NPMs in proposing legislation, the EU could work to improve NPMs' understanding of EU law and to involve them more systematically in the EU law making process. Greater interaction between EU institutions and NPMs may also contribute towards addressing some of the barriers identified at the national level, such as low levels of awareness of NPMs among the judiciary and other stakeholders and generally low levels (though varying across Member States) of interaction between the judiciary and the NPMs. One interviewee also suggested that the work of NPMs might be enhanced by collaboration with non-government organisations.

With respect to procedural rights, as discussed in Chapter 3, existing monitoring efforts do not provide a clear answer on the extent to which rights are violated, nor why violations occur in the first place. To address this situation, the Commission could support the deployment of assessment tools designed to answer these questions in a systematic manner. As mentioned under Option 1, one example is an assessment tool on PTD, developed by the Human Rights National Implementation Division of the Council of Europe under the EU-CoE Programmatic Cooperation Framework (PCF) (Council of Europe, 2017b). On a related note, an interviewee suggested that the Commission encourage Member States to undertake additional data collection, particularly in instances where there are inconsistencies between national legislation and practice, as is frequently the case with PTD. As one example, the interviewee called for a more systematic collection of data on the use of alternatives to detention, such as home arrest.

The Commission can also develop and distribute guidelines to Member States on existing monitoring efforts and their possible improvements. One step in that direction would be the unification of definitions, such as what counts as PTD (e.g. as opposed to police detention) and minimum space in detention facilities. The latter point was highlighted by an interviewee who observed that while there is information available from Member States, no one knows how statistics are calculated in their own country, let alone other European countries.

Lastly, one interviewee highlighted that there is currently no system to follow up on the execution of mutual recognition framework decisions. To illustrate, in post-*Aranyosi* instances where the executing Member State is able to obtain sufficient guarantees of adequate treatment, there are no standing mechanisms through which the executing Member State can verify the accuracy of the previously obtained information. Efforts to build and improve repositories of relevant information (discussed under Option 3a) may help solve this issue.

³⁰⁷ Only five Member States (Austria, Belgium, Finland, Lithuania and Sweden) have opted for the automatic publication procedure (Council of Europe, 2017c). The FRA has also called such authorization a 'promising sign' (FRA 2016a).

Does it require new legislation? Does the EU have competence to act?

The Lisbon Treaty has brought EU criminal law within the ordinary enforcement mechanisms under the European Treaties. This includes a strong role for the Commission in monitoring and taking enforcement action if Member States do not give adequate effect to EU law. No legislative action needed.

What is the possible EU added value?

In comparison with action at the Member State level, EU action is likely to result in added value for the following reasons. First, the lack of harmonisation in areas such as definitions and data collection standards has created obstacles for the understanding of existing issues. Second, EU action can result in greater effectiveness and efficiency of monitoring efforts through increased coordination and prevention of duplication of effort among existing monitoring initiatives.

What are the possible challenges or limitations to this option?

Several limitations to this option can be identified, particularly pertaining to the role and work of NPMs. First, some NPMs feel their mandate is limited. From this perspective, substantial collaboration with the judiciary (and perhaps legislators) may be perceived as inconsistent with NPM’s mission and therefore not an attractive option for the NPMs. In turn, judiciaries, including those in other Member States, may not be willing to accept information provided by NPMs, for example, due to lack of familiarity with their work and status (Tomkin et al., 2017).³⁰⁸

Second, as one interviewee pointed out, the portfolio of some NPMs is large and detention conditions may represent only a small share of their responsibilities (see for example a comparison by Aranda, 2015). This in turn renders the volume of resources that could be dedicated to detention conditions limited.

Third, Tomkin et al. (2017) pointed out that NPMs may not be in a position to systematically address the challenges presented by the *Aranyosi* decision. The information required in cases involving framework decisions are case specific (i.e. need to reflect the situation of the person concerned) and, according to Tomkin et al, there have been relatively few instances in which NPMs have been able to provide this type of information. In addition, the study reported a consensus view among NPM representatives in that any monitoring of mutual recognition assurances would extend beyond their mandate and available resources.

- Option 2c: Establish an EU mechanism on democracy, rule of law, and fundamental rights

Similarly to Option 1, this option aims at improving the system and mechanisms available to EU institutions for monitoring and enforcement relating to serious and systematic fundamental rights violations.

Concrete steps that could be taken in this area:

- Establish an EU monitoring system for rule of law, democracy and fundamental rights.

³⁰⁸ Tomkin et al. (2017) noted awareness of NPMs as a precondition of successful executions of mutual recognition instruments regarding cross-country transfers of individuals.

What would this option involve?

One possibility to address the deficiencies in the current framework on democracy, rule of law and fundamental rights (DRF) is the establishment of an EU DRF mechanism. Such a mechanism was called for in a 2016 EP resolution, which recommended the establishment of an EU Pact for DRF in the form of an interinstitutional agreement (EP, 2016d). The Pact, as envisaged by the EP, would incorporate the following elements: 1) an annual European DRF report; 2) a DRF policy cycle addressing Member States compliance based on the DRF report and consisting of an annual inter-parliamentary debate on the basis of the DRF report and follow-up and remedial mechanisms based on the Treaties; and 3) a DRF policy cycle within EU institutions.

Importantly, to the extent possible, the mechanism would build on and incorporate existing relevant initiatives. Both the Commission's rule of law framework and the Council's rule of law dialogue would be subsumed in the new DRF mechanism. Similarly, the annual DRF report, composed of a general part and country-specific recommendations and prepared by an expert panel,³⁰⁹ would aim to draw on and leverage existing data collection and monitoring mechanisms. In addition, the Committee calls for the utilisation of the proposed European Fundamental Rights Information System (EFRIS).

In response to the lack of a standing EU monitoring mechanism in the area of fundamental rights (FRA, 2013), EFRIS would form a one-stop shop for all relevant information by pulling together data from various existing sources. The system could help prevent duplication by raising awareness of ongoing data collection and monitoring, and could be used in populating indicators of compliance by individual Member States with their fundamental rights obligations. The FRA reiterated the recommendation in 2016 in response to the EP's request for an opinion on the development of an integrated fundamental rights indicator tool, and also called for the integration of 'fundamental rights' into relevant policy cycles (FRA, 2016).

On the basis of the assessments presented in the DRF report, an inter-parliamentary debate would be organised to address the report's findings and country-specific recommendations.³¹⁰ The DRF report could also be used as the basis for a variety of follow-up and remedial actions. In consultation with the EP and the Council, the Commission may propose an evaluation of the implementation of AFSJ policies,³¹¹ non-compliance by Member States with DRF standards may also trigger a dialogue with the Commission, or, in more serious cases, an invocation of Article 7 TEU. In addition, the mechanism envisages the use of a novel 'systematic infringement procedure'.

Based on a proposal by Scheppele (2015), this represents an enhancement to the current infringement powers of the Commission, whereby the Commission would not bring individual cases to the CJEU but would rather bundle multiple cases together in an infringement 'package'. The underlying rationale is that the Commission would be better able to demonstrate a systemic breach of treaty obligations. A CJEU finding of a systemic violation would in turn open the possibility of requiring compliance with Article 2 provisions.

³⁰⁹ The involvement of an expert panel is in line with a recommendation by one interviewee who, while not specifically commenting on the DRF mechanism, called for the establishment of an independent reporting mechanism that would decrease the EU's reliance on Member States assessment.

³¹⁰ The LIBE Committee envisages the debate as part of a multi-annual review process involving EU institutions, national parliaments, CoE, FRA and civil society (EP, 2016d).

³¹¹ In accordance with Article 70 TFEU.

In a follow-up proposal (not reflected in the EP resolution), Kochenov (2015) suggested that the systemic infringement approach described above could be applied through greater use of Article 259 TFEU as an enforcement tool. Under the provisions of Article 259, individual Member States can bring other Member States to the CJEU for violations of treaty obligations. The presumed advantage of this approach is that it can force a court ruling independent of the Commission, which may decide not to pursue the case. Article 259 provides for the Commission being the first port of call for Member States wishing to bring an action; however, Member States are not bound by the Commission's decision whether or not to take up the case or what arguments to use. Further, Bard et al. (2016) suggested that an additional advantage of this approach is that, since it is the Member States bringing the suit, it is immune from accusations of a 'power grab' by the Commission.

An alternative form of enforcement, not mentioned in the EP resolution but addressed in an EAV assessment of the mechanism and its accompanying research paper (Pech et al., 2016), may be applicable here. The FRA (2015) (as well as one interviewee) suggested introducing a systematic element of conditionality to European Structural and Investment funds tied to Member States' performance in the area of DRF. This step would have the effect of reducing the allocations for Member States found in violation of their obligations under existing EU law and international standards. One requirement for this option to be implemented would be the establishment of benchmarks that would trigger action under this mechanism, which could be done on the basis of the DRF report and the ensuing inter-parliamentary debate.

One interviewee also made the case for greater initiative on the part of the EU, limiting its reliance on CoE's work. According to the interviewee, CoE's larger membership means it has slightly different priorities and needs than the EU (e.g. comparatively less interest in the execution of mutual recognition instruments), which creates the need for EU-only monitoring and subsequent enforcement. Another interviewee pointed out that the EU, unlike the CoE, can exercise enforcement powers and made the case for more robust EU-run monitoring mechanisms.

In the context of leveraging existing data and efforts, the EU DRF mechanism may also utilise the fact that several relevant options for enforcement action rest with existing powers of the CoE.³¹² This is consistent with remarks by one interviewee, who commented on the possibility of the Commission leveraging the CoE's monitoring and enforcement in its own activities, albeit not in the specific context of any EU DRF mechanism. According to the interviewee, the Commission is increasingly interested in the enforcement of ECtHR judgments as the number of cases relevant for EU law is growing. The research team suggest that information on ECtHR judgments against Member States, as well as data on their implementation could be incorporated in the DRF report and the subsequent policy cycle. In particular, pilot ECtHR judgements could be taken by the EU as an indicator of a systemic breach of fundamental right safeguards and, by extension, violation of EU law (if applicable) or rule of law more broadly.

³¹² Article 46 of the Convention enables the Committee of Ministers to take action against states that continue to fail to comply with the ECtHR's requirements. In addition, the Assembly has the power to penalise states' persistent failures to uphold their obligations and/or non-cooperation with the monitoring procedure. Available forms of sanctions include the adoption of a resolution and/or a recommendation and non-ratification or annulment of credentials of a parliamentary delegation from the sanctioned country. In the event of continuous serious breaches of obligations, the Assembly may request the Committee of Ministers to take action under Article 7 and 8 of the Statute of the Council of Europe. These Articles provide for the Committee to suspend a country's rights of representation and request it to withdraw from the Council of Europe. In the event of the state's non-compliance with this request, the Committee has the power to terminate its membership (Council of Europe, 2017f).

Does it require new legislation? Does the EU have competence to act?

No legislation is needed. The EU is obliged through Articles 2, 3(1) and 7 TEU to protect its 'constitutional core', i.e. values it shares with Member States (Bard et al., 2016).³¹³ Building on these fundamentals, individual components of the proposed EU DRF mechanism draw on various parts of the Treaties. The EP proposes the establishment of the EU Pact for DRF on the basis of Article 295 TFEU (EP, 2016d). Requests implementation evaluations in response to the DRF report would use Article 70 TFEU, although this provision would not be available for non-AFSJ aspects of DRF. Infringement procedures (including their enhancements discussed above) are based on Articles 258–260 TFEU while eventual action in response to DRF non-compliance would build on the abovementioned responsibility to protect the constitutional core, namely Article 7 TEU. New legislation would likely be needed for the linkage between DRF compliance and European Structural and Investment funds allocations (Pech et al. 2016).

What is the possible EU added value?

The added value of the EU DRF report lies in the fact that it would enable a more effective allocation of monitoring and evaluation activities, rectifying gaps in coordination across individual existing mechanisms and possible overlaps and/or lack of coherence among these. In addition, EU action may result in improved coordination between EU institutions and between EU and national institutions in the enforcement of DRF standards (van Ballegooij and Evas, 2016).

What are the possible challenges or limitations to this option?

The establishment of an EU monitoring system may be stymied by the lack of political will for such an exercise. One possible parallel and illustrative lesson is the EU Anti-Corruption Report. Issued in 2014, the report represented an assessment of the state of play in all Member States, highlighting persistent deficiencies and gaps in individual countries. The report built on and incorporated lessons and data from already existing monitoring mechanisms, such as CoE's Group of States Against Corruption (GRECO). The second edition of the Anti-Corruption Report was originally scheduled to be published in 2016; however, those plans were subsequently abandoned and no new date of publication is currently foreseen (Nielsen, 2017).

The compilation of the DRF report based on available sources, as well as the utilisation of EFRIS, may run into technical difficulties owing to differences in underlying methodologies, data collection processes, definitions, etc. (Bard et al., 2016). This may constrain the ability to undertake international comparisons and draw cross-cutting assessments or conclusions.

Ultimately, the effectiveness of the EU monitoring system will depend on the quality of follow-up mechanisms and the effectiveness of and willingness to use envisaged enforcement mechanisms. In this regard, the alternative of a systematic infringement procedure represents a novel approach and its effectiveness is therefore not known. The use of Article 259 would require a Member States, or a group thereof, to take action against a fellow Member State, which has so far occurred very rarely (Pech et al., 2016). It is not clear that bundling infringement cases would make Member States more likely to resort to this option. Similarly, while the EU DRF mechanism would introduce a more structured process preceding any

³¹³ For a detailed discussion of the evolution of the articulation of EU values and their protection, see Pech et al, 2016. At the same time, Pech et al. (2016) concluded that there appears to be a lack of clarity with respect to the legal basis for EU action pertaining to the protection (monitoring and/or enforcement) of values expressed in Article 2 TEU.

eventual invocation of Article 7 TEU, it is not clear this would actually alter Member States' approach to Article 7 proceedings.

III – Ensuring proper implementation of EU legislation

- **Option 3a: Support the implementation of existing EU legislation through soft measures**

This action could address in particular the following gaps:

- MR2 Assessments of detention conditions needed for the EAW and TOP are rarely conducted and difficult in practice.
- MR3 Under-use of the instruments (ESO, PAS).
- MR7 Proportionality in the use of the EAW and EIO.
- MR8 Cost of EAWs.
- MR9 Inconsistent consideration of factors contributing to social rehabilitation in relation to FD TOP.
- MR10 Risks of a de-facto deterioration of prisoner's situation in relation to FD TOP.
- MR11 Not all Member States include specific measures to protect vulnerable persons in relation to FD TOP.
- MR12 Lack of understanding and knowledge of the FD TOP among practitioners.
- RM1 Costs incurred to suspects and accused persons: A number of the gaps related to a situation where a suspect might be charged (for example, for copies for information).
- RM2 Extensive grounds for refusal/ derogation: these are gaps where the Directive or national implementation allows for many situations in which the duty to provide for the right does not apply.
- RM3 Ineffective remedies: gaps related to the lack of ability to appeal or claim compensation for lack of protection of rights.
- RM5 Actions are non-binding: these are gaps related to the recommendation on procedural safeguards for vulnerable adults.
- RM6 Implementation means rights are not protected in practice: the category includes a larger number of gaps than the others. All of the gaps here are examples where the way in which the safeguards or measures are implemented in practice does not match expectations in the Directives or does not, in practice, protect the rights. It includes gaps relating to the quality of services such as legal aid and translation, the timeliness of the protection provides, such as the provision of the letter of rights.
- RM7 Lack of practitioner knowledge: this is a cross-cutting barrier, relevant to many gaps.
- RM8 Variation between MS in implementation: gaps where the Directive leaves scope for MS to decide on matters, resulting in different practices in different MS.
- RM9 MS Financial constraints: this is a cross-cutting barrier, relevant to many gaps.

Concrete steps that could be taken in this area:

- Provide financial and technical assistance and training to legal professionals, and facilitate exchange of experience and best practices.
- Develop practical guidelines, recommendations and clarifications applicable in the implementation of EU Directives.
- Continue assessing the root cause of fundamental rights violations to better tailor future training/ assistance.

What would this option involve?

There was consensus among interviewees spoken to in the course of this study that at least part of the deficiencies surrounding procedural rights and detention conditions in the EU are linked to inadequate financial and technical resources available at the Member State level and gaps in awareness and training among relevant stakeholders, primarily legal practitioners (lawyers,

prosecutors and judges). A similar conclusion was reached by Fair Trials, FRA and the CCBE. In addition, as discussed in Chapter 3, a notable share of issues associated with the implementation of EU Directives can be found in areas left for Member States to operationalise. For example, the Directives left the issue of ascertaining the necessity of translation/interpretation to Member States. Similarly, as discussed in Chapter 2, some issues associated with the mutual recognition instruments can be traced to variations in national approaches to their implementation and uptake.

In response, the Commission could intensify its efforts to provide financial and technical assistance to Member States and relevant stakeholders. Examples of initiatives in this area include, but are not limited to, coordination of the exchange of best practices, creation of working groups and exchange programmes, and organisation and facilitation of training (including e-training) for judges and other practitioners. One interviewee specifically highlighted the need for continuous training for legal professionals, for whom it is extremely challenging to keep up-to-date with the multitude of potentially applicable legal texts, and would like to have more tools at their disposal to apply all these legal texts in a coherent manner.

To that end, the Commission could develop and disseminate practical guidance and clarification in areas where there may be uncertainty and inconsistency both across and within individual Member States. Examples pertaining to the EU Roadmap Directives identified and put forth in the reviewed literature include:³¹⁴

- **Interpretation and translation.**
 - o Guidelines on how to assess need for interpretation and translation.
 - o Definitions and lists of ‘essential documents’ to be covered by the Directive, along with guidelines on the application of any exceptions.
 - o Recommendations on specific safeguards to ensure that the confidentiality of communication between suspected or accused persons and their legal counsel is strictly respected.
 - o Clear and binding rules on the conditions for using alternative ways of securing legal interpreters or translators, if registers of independent interpreters and translators are not established. These rules could include specific quality safeguards and professional standards, such as a minimum level of education or years of experience to be included on alternative lists.
- **Rights and information.**
 - o Guidance on how to deliver information in non-technical and accessible language, including the written Letter of Rights.
 - o Guidelines on practical arrangements to facilitate access to case materials.

Safeguards for children.

- o Develop a standardised assessment tool for the needs of children and vulnerable people. Such a tool could require a medical examination by an independent expert (as prescribed in section 2 of the 2013 Commission Recommendation on procedural safeguards for vulnerable persons) and could provide standardised guidelines and indicators to assess economic, social and family background, and any specific vulnerabilities that the individual may have.

³¹⁴ As discussed in Chapter 1 and 2, due to the recency of some of the Roadmap Directives, gaps and barriers are predominantly identified with respect to the oldest documents.

Similarly, with respect to the mutual recognition instruments, in addition to training recommendations, existing literature³¹⁵ includes the following suggestions:

- **Development and dissemination of a handbook to assist with the implementation of individual FDs**, following the example of EAW handbook (European Criminal Bar Association, 2017) and its recent update from the Commission on how to issue an EAW (EC, 2017a). This is already in progress for FD TOP (Meysman, 2016; Elliott, 2017) and FD PAS (FRA, 2016b).
- **Creation and subsequent improvements of repositories of relevant information**, for example best practices, and contact information for relevant authorities, practitioners and experts. Again, efforts in this direction have already been undertaken and can be intensified, e.g. collaboration with the EJN e-Justice portal etc. (European e-Justice). This effort could address the post-*Aranyosi* question of where issuing state authorities can obtain information on detention conditions and sentence execution practices in executing countries and who to contact to ascertain the circumstances pertaining to individual transfer cases. Along similar lines, the FRA launched (at the Commission's request) in 2017 a project on developing a one-stop shop database on detention conditions, alternatives to detention and other relevant information in individual Member States that would be available to practitioners seeking this type of data (FRA, 2016c). As such, when established, the repository could support the execution of mutual recognition instruments and perhaps provide an answer to how executing authorities can and should check fundamental rights concerns post-*Aranyosi*. It may also help confirm the veracity of previously reviewed information and received assurances once a transfer has been carried out.
- **Systematic data collection on use of the FDs**. This step can take advantage of designated implementing authorities in each Member State and can be integrated with other ongoing monitoring systems (e.g. SPACE questionnaires) (CEP., 2016). Conceivably, information on the use of the FDs would be relevant for any potential European DRF Report (as discussed under Option 2c).
- **Continued support for the implementation of other EU laws that have implications for the functioning of mutual recognition instruments**. Examples include the Roadmap Directives (e.g. Directive on access to lawyer for FD ESO) and other legislation not in scope of this paper (e.g. the European Data Protection Regulation and Directive) (Tomkin et al., 2017).
- **FD-specific steps:**
 - o **In support of FD ESO**. Take steps to educate members of the public and legal practitioners on the risks and costs associated with high levels of PTD (Tomkin et al., 2017). The underlying rationale is that by increasing awareness of the costs of not using the ESO, prosecutors and judges (as well as the general public) may be more inclined to explore the use of the instrument.³¹⁶ The calculations presented in Chapter 5, could be used to support such efforts.
 - o **In support of PAS**. Develop and support incentives for prosecutors to encourage greater use of the instrument (e.g. provision of electronic tagging) (Tomkin et al., 2017).

Specifically in the context of training and exchange of experience and best practices, one interviewee stressed the importance of reaching individual practitioners. The interviewee noted

³¹⁵ For example, Vermeulen et al. 2011; Tomkin et al., 2017.

³¹⁶ This would not in itself improve the practical implementation of the ESO but could address the issue of its very low levels of use.

that the work done by the Commission in convening expert groups on the topic did not necessarily reach to the practitioner level.

More fundamentally, one interviewee noted that in numerous instances there is not a clear understanding of why violations of fundamental rights occur on the ground. In other words, even in situations where there are clear rules and guidelines (including existing case law), the root causes of violations may not be known. As a possible response, the interviewee suggested developing and applying coherent assessment tools that would review the existing practice on the ground. As mentioned above, one example is the assessment tool on PTD, developed by the Human Rights National Implementation Division of the Council of Europe under the EU-CoE PCF (Council of Europe, 2017b). The tool, while developed for one country in particular (Georgia) could be repurposed for use in other jurisdictions and a similar approach to assessment can be utilised in the context of other fundamental rights. Unfortunately, further information about the methodology of the tool is not publicly available.

Does it require new legislation? Does the EU have the competence to act?

The Commission's monitoring and enforcement mandate extends to the adoption of soft measures supporting the effectiveness and compliance with EU law, such as training. Measures to promote judicial cooperation are based on Article 82(1) TFEU. No legislation is needed; only non-binding instruments, such as guidelines and recommendations.

What is the possible EU added value?

The potential for EU added value stems from several factors. First, a coordinated supranational approach to the provision of technical and other forms of assistance is desirable as some of the underlying issues stem from the lack of coordination and divergences in national approaches. Second, proper execution of cross-national transfers of persons and adjudication of cases requires access to information, data and contacts, the compilation of which may be best coordinated at the centralised level. And third, the set of gaps and corresponding policy options across all Directives and mutual recognition instruments are similar and/or interrelated, strengthening the case for a coordinated response by the Commission.

What are the possible challenges or limitations to this option?

One interviewee pointed out that this set of steps does not necessarily represent a novel suggestion. In fact, a considerable amount of these types of activities are already ongoing. Two examples of efforts in this area include:

The EJTN, supported by EU's Justice Programme (European Judicial Training Network, 2017), CoE-run Human Rights Education for Legal Professionals (Council of Europe, 2017e) as well as training seminars carried out by ERA.

Specifically in the domain of translation and interpretation, an important training role is also fulfilled by the European Legal Interpreters and Translators Association (EULITA) and its focus on training and exchange of best practices (EULITA, 2009).

In the view of the interviewee, the continuation and possible intensification of these efforts would represent a welcome step but may yield only limited additional benefits in comparison with other options for action, such as increased emphasis on enforcement (Option 3b) and on closing the gaps in existing legislation (Options 4a and 4b).

- **Option 3b: Enforce the implementation of existing EU legislation**

This action could address in particular the following gap:

RM6 Implementation means rights are not protected in practice: the category includes a larger number of gaps than the others. All of the gaps here are examples where the way in which the safeguards or measures are implemented in practice does not match expectations in the Directives or does not, in practice, protect the rights. It includes gaps relating to the quality of services such as legal aid and translation, the timeliness of the protection provides, such as the provision of the letter of rights.

Concrete steps that could be taken in this area:

- Increase Commission’s technical capacity to undertake enforcement activities.
- Explore leveraging CoE monitoring in Commission’s enforcement efforts.
- Consider harmonising provisions for private enforcement.

What would this option involve?

The primary responsibility for the enforcement of the implementation of the Roadmap Directives lies with the Commission and its power to initiate infringement proceedings against individual Member States. Two interviewees explicitly highlighted this course of action as desirable for the improvement of protections of fundamental rights in the EU and encouraged the Commission to make more use of this power. In exploring possible reasons for the perceived low utilisation of infringement proceedings, both interviewees noted that one option could be to review whether the level of staffing available at the Commission to oversee the implementation of the Directives and initiate possible resulting infringement is sufficient.

As discussed under Option 2c, the Commission could also leverage better CoE monitoring and enforcement mechanisms. Specifically in the context of infringement proceedings, the Commission may look at ECtHR’s judgments and their implementation for any grounds on which it may be appropriate to initiate such proceedings.

Lastly, moving beyond enforcement action by public authorities, one interviewee suggested an expansion to private enforcement action to facilitate the enforcement of EU law. This step could take the form of EU legislation ensuring that the very same remedies (for instance, compensation) are available across all Member States to people who suffered damages under the Roadmap Directives. Possible applicable lessons for this option may be drawn from the existing antitrust enforcement regime in the EU, which permits private enforcement action (Wils, 2016).³¹⁷

Does it require new legislation? Does the EU have the competence to act?

The Commission’s power surrounding infringement proceedings is provided for in Article 258 TFEU.

³¹⁷ In EU Antitrust Law, private enforcement refers to the use of Articles 101 and 102 TFEU in litigation between private parties in the courts of the EU Member States, as opposed to public enforcement, where the proceedings are conducted or brought by competition authorities. Similarly, in EU criminal law, private parties (individuals) could be offered the opportunity to advance independent claims or counterclaims based on the EU provisions, before a national court.

What is the possible EU added value?

The added value from action at the EU level lies in improved implementation of EU law and, by extension, greater protection of fundamental rights in the EU. This policy option can be executed only at the EU level, although, strictly speaking, it can be contrasted with action by Member States in accordance with Article 259 TFEU. However, the latter has been used only very rarely.

What are the possible challenges or limitations to this option?

In addition to the possibly inadequate resources available to the Commission, as suggested by the interviewees, several other limitations and challenges can be noted. As stated above, the use of the ordinary infringement procedure may take a long time to produce tangible results. In addition, one interviewee felt that the Commission was reluctant to execute its enforcement powers despite receiving a sufficient amount of complaints. In this regard, the ability to enforce EU law is constrained by the Commission's willingness to use its powers.

IV – Reviewing existing EU legislation to ensure better fundamental rights compliance**- Option 4a: Amend existing mutual recognition instruments**

This action could address in particular the following gaps:

- MR1 Limited ability to refuse execution on fundamental rights grounds in all but the EIO.
- MR4 Consent to a transfer is not always needed or is implied.
- MR5 Procedures to ensure information, understanding and translation regarding transfer of persons are not specified in FD TOP, ESO and PAS.
- MR6 Rights to appeal transfers are not included in any of the FDs.
- MR9 Inconsistent consideration of factors contributing to social rehabilitation in relation to FD TOP.
- MR10 Risks of a de-facto deterioration of prisoner's situation in relation to FD TOP.

Concrete steps that could be taken in this area:

- Introduce fundamental rights refusal ground.
- Strengthen protection of fundamental rights by further amendments to existing framework decisions.

What would this option involve?

Legislative action represents an option to address gaps identified in connection with the functioning of existing mutual recognition instruments. Several aspects that could be addressed via legislative action would be applicable to multiple FDs:

- **Insert explicit fundamental rights refusal ground.** This addition would be applicable to FDs EAW, TOP, PAS and ESO.³¹⁸ The negotiations and text agreed on for the EIO Directive could serve as a model.³¹⁹ In conjunction with the refusal ground, the consultation process between the authorities in the executing and issuing country could

³¹⁸ The relevant articles that would need to be amended are Article 3 and 4 FD EAW, Article 9 FD TOP, Article 15 FD ESO, Article 11 FD PAS.

³¹⁹ The inclusion of a fundamental rights-based refusal ground in mutual recognition instruments is also called for by a 2014 EP Resolution on the review of the EAW (European Parliament Committee on Civil Liberties Justice and Home Affairs, 2014).

be strengthened (Weyembergh, 2014). As part of this process, post-transfer verification/monitoring mechanisms could also be introduced.

- **Introduce a proportionality test.** This could be required before a decision/order/warrant is issued, thereby helping ensure the proper utilisation of existing instruments. As part of this process, issuing authorities could be explicitly required to consider alternatives offered by other mutual recognition instruments, where applicable (Weyembergh, 2014). As above, the text of the EIO Directive could serve as a model. Along similar lines of reasoning, specifically with respect to FD TOP, Vermeulen et al. (2011) recommended introducing a motivational duty for the issuing state, which would oblige relevant authorities to determine the following on the transfer certificate: 1) social rehabilitation prospects of the individual; 2) assurances of no aggravation of the person's situation in the executing state; and 3) assurances of adequate detention conditions in the executing state. In addition to the direct benefit of protection the individual's position, the introduction of motivational duty may indirectly result in additional pressure on Member States to uphold international detention standards in order to keep the FD operational.
- **Address legal remedies.** This step would require Member States to introduce an appeal/remedy mechanism against decisions to execute or not to execute (Vermeulen et al., 2011). This may be particularly important for FD TOP proceedings, which (under some circumstances) do not require consent of the person affected (FRA, 2016a).³²⁰
- **Determine procedures for obtaining consent and ensuring informed consent.** This step would standardise the method of obtaining consent (where required) and would lay down minimum rules for the provision of information to persons potentially subject to transfer to ensure their consent and/or opinion are fully informed.³²¹ To that end, the existing Directives on translation/interpretation and on the right to information can serve as a model. In addition, in instances where informed consent is required, this step could introduce provisions for its withdrawal within a specified period of time (FRA 2016). This step would be applicable to FDs TOP, PAS and ESO.³²²

For the introduction of the general measures above, Weyembergh (2014) notes there are three options on how this can be achieved. The first option is a formal amendment of the FDs. Importantly, this would not require the reopening of the surrounding negotiations, as the precedent of the *in absentia* FD³²³ demonstrated. The second option would be to adopt a parallel instrument, along the lines of the Roadmap Directives. Under this option, the changes to the FDs would not be inserted into the FD texts themselves, but would exist in a separate document. And third, the EU could adopt an instrument that limits itself to the clarification of certain provisions of the FDs. For instance, the instrument may clarify that the Articles referring to Article 6 TEU need to be read in conjunction with the Recitals on respect for fundamental rights, which, according to Weyembergh may be sufficient to amount to an express ground for refusal. One disadvantage of this option is that it may not be available for all the steps listed above.

In addition to the general measures above, Vermeulen et al. recommended the following steps specifically with respect to FD TOP (Vermeulen et al., 2011):

³²⁰ Opinion and notification of the sentenced person are addressed under Article 6 FD TOP.

³²¹ Specifically in the context of FD TOP, Vermeulen et al. (2011) also recommended introducing the right to an informed consent.

³²² The relevant articles are Article 6 FD TOP, Article 5 FD TOP, Article 9 FD ESO.

³²³ FD 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

- **Remove limitations on the double criminality requirement.** Instead, the requirement of double criminality should be reinstated for all offences. In order to avoid placing a large burden on the authorities of the issuing state, it should be possible to draw on information collected via the EU level offence classification system (EULOCS)³²⁴ to ascertain whether the double criminality requirement is met.³²⁵
- **Introduce a general *lex mitior* principle to protect the position of transferees with respect to sentencing equivalence and sentence execution.** This could be supported by the extension of approximation measures to enhance sentence equivalence and by the development of conversion tables and/or severity rankings to be applied for the purposes of assessing sentence equivalence and comparing sentence execution.³²⁶
- **Introduce the right to legal assistance.** This would be applicable during the transfer process and would serve as an additional safeguard and acknowledgement of individuals' procedural rights.³²⁷

Does it require new legislation? Does the EU have the competence to act?

The review and amendment of existing legislation requires a formal legal basis. Article 82(1) is the basis for judicial cooperation.

What is the possible EU added value?

The added value of the proposed steps would be a strengthening of fundamental rights protections in existing mutual recognition instruments, thereby enhancing mutual trust and contributing to an improved application of the principle of mutual recognition. The proposed option concerns action at the EU level as it addresses amendments to EU legal instruments.

What are the possible challenges or limitations to this option?

A possible limitation lies in the fact that even amended mutual recognition instruments will require proper implementation by national authorities and practitioners and will be liable to the same type of barriers as the current versions. For that reason, amendments to the mutual instruments should be coordinated with continued efforts to support their proper implementation, as discussed under Option 2a.

Amending the FDs may involve reopening the negotiations surrounding the instruments, which can lead to delays and unintended consequences³²⁸.

- Option 4b: Amend existing Roadmap Directives

This action could address in particular the following gaps:

³²⁴ EULOCS was established to map the commonalities and divergence across national criminal justice systems and their approaches to criminalisation. It identified common areas in offence definition across Member States to facilitate their judicial cooperation (Vermeulen & De Bondt, 2009).

³²⁵ Double criminality is addressed in Article 7 FD TOP.

³²⁶ The relevant provisions on the enforcement of the sentence by the executing state are in Article 8 FD TOP.

³²⁷ Particularly with respect to EIO and ESO, this point could also be regarded as a gap in the Roadmap Directives as they do not cover mutual recognition instruments other than the EAW.

³²⁸ Similarly, in the context of amending procedural rights Directives, one interviewee strongly advised against reopening corresponding negotiations, recalling the effort required to reach agreement on the original texts. Weyembergh (2014) cites the FD *in absentia* as an example of an amendment that did not result in the reopening of the negotiations on EAW.

- RM2 Extensive grounds for refusal/ derogation: these are gaps where the Directive or national implementation allows for many situations in which the duty to provide for the right does not apply.
- RM3 Ineffective remedies: gaps related to the lack of ability to appeal or claim compensation for lack of protection of rights.
- RM4 Gaps in EU Legislation: these are gaps where the cause is the scope or coverage of legislation. It includes instances, such as PTD, where there is no EU legislation, and situations where Directives have been criticised for not covering a wide enough scope.
- RM5 Actions are non-binding: these are gaps related to the recommendation on procedural safeguards for vulnerable adults.
- RM8 Variation between Member States in implementation: gaps where the Directive leaves scope for Member States to decide on matters, resulting in different practices in different Member States.
- RM9 Member States' financial constraints: this is a cross-cutting barrier, relevant to many gaps.

Concrete steps that could be taken in this area:

- Amend existing Directives to diminish scope for national inconsistencies
- Amend existing Directives to increase their consistency, e.g. with respect to remedy provisions
- Codify existing Directives.

What would this option involve?

Amendments to existing EU legislation can take several directions. First, the EU could amend the Directives to regulate issues that are currently left to discretion of Member States or that have been clarified by the CJEU, and which cause inconsistencies in national application. The issues for potential clarification are similar to those listed under soft measures under Option 2a.

Amending the existing Roadmap Directives could provide a solution to the gaps and barriers identified in Chapter 3, as follows:

The scope of the Directive on translation and interpretation could be expanded. Article 5.2 of the Directive could be amended and expanded to include provision for mandatory registers of legal interpreters and translators, and specific standards for entry onto the register. Article 5.3 could be expanded and clarified so that interpretation of the communication between the lawyer and the suspect is held to a strict professional secrecy. To fully safeguard the right to complain about quality, Articles 2.5 and 3.5 could be extended, giving the suspect or accused the right to change the interpreter and/or the translator on the grounds of quality. Article 2.2 could be expanded so as to provide the right to interpretation not only “in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications” but every time the suspect or accused person is communicating or consulting with the lawyer from a place of custody, from remand or from prison, at the police station or the court.

The Directive on the right of information could be amended. Article 7(4), which permits limitations on the right of access to the materials of the case if they do not prejudice the right to a fair trial, could be amended to reflect ECtHR case law: restrictions must be justified on the facts of the case, have a clear basis in domestic law and not be excessively broad in their scope.

The Directive on access to a lawyer could be amended to limit and clarify the scope of permitted derogations. Limitations on the power to derogate included in Recitals 30-32 could be included in the main text of the Directive. If there are exceptional situations

where access to the lawyer of the suspect's choice could result in jeopardising the investigation, these should be addressed by denying access to this specific lawyer while allowing access to another independent lawyer; Article 8 could therefore be amended to explicitly include the possibility to appoint an alternative lawyer in such derogation cases.³²⁹

The Directive on access to a lawyer, or the Directive on legal aid, could be amended to include the right of provisional legal aid. Provisional legal aid would be a kind of emergency legal aid of a temporary nature that Member States should grant when suspects or accused persons are deprived of liberty. The right to provisional legal aid should last until the competent authority has taken the final decision on the eligibility of the suspect or accused person for (ordinary, regular) legal aid. Such provision was included in the first Commission proposal on provisional legal aid and legal aid (Cras 2017).

The Directive on presumption of innocence could be amended to extend the protection in Article 2 explicitly to those 'persons other than suspects or accused persons who, in the course of questioning, become suspects or accused persons' and to include reference to waiver of rights.

The Directive on procedural safeguards for children could be amended to include a definition of vulnerability and questioning. Although the exclusion of mandatory representation by a lawyer was a necessary condition to reach a final agreement on the proposal, the Directive could still be amended to "re-include" mandatory assistance: all children in criminal proceedings who have the right of access to a lawyer in accordance with Directive 2013/48/EU should be assisted by a lawyer. Article 7 on the right to an individual assessment could be amended to address in more detail what information about the individual characteristics and circumstances of the child should be assessed.

Second, the EU could amend the text of the Directives to address instances of incoherence. In this regard, one interviewee stressed the desirability of ensuring provisions on remedies are consistent across all Directives. Findings from the literature review, presented in Chapter 3, were that the provisions on remedies are vague and incoherent and may be insufficient. For example, remedies to challenge poor quality interpretation have been said to be ineffective (Fair Trials 2016b), the protection against the use of evidence acquired in breach of the right of access to a lawyer has been said to be insufficient (Anagnostopoulos, 2014), and the provisions on remedies on presumption of innocence do not reflect current ECHR/EU law (Sayers, 2015). Accordingly, one policy option could be to introduce specific measures to ensure common standards between Member States in relation to the nature of remedies that should be provided if procedural rights are breached, and to ensure that there is a coherent approach to remedies across the Directives. Specific common provisions could be introduced in each Directive to guarantee that enforceable and effective remedies are available. In this regard, Legal Experts Advisory Panel's (LEAP) Judicial Remedies Working Group (Fair Trials - LEAP, 2017) is currently examining the gap between increased fundamental rights protections in the EU and comparative lack of focus on remedies. Its work, expected to be published in 2017, may shed some light on the relative merits of the different options to harmonise remedies.

Third, EU Directives, currently expressed in six standalone documents, could be brought into one text. The EU could make use of the codification process, or the recasting procedure if new

³²⁹ This was also the position of the Council of Europe Secretariat. See: Opinion of the Secretariat on the Commission's Proposal for a Directive on "the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest" Strasbourg, 9 November 2011

substantive changes are involved.³³⁰ This step may help address a challenge, noted by an interviewee, that one possible barrier to implementation of existing law by legal professionals is their confusion by the multitude of existing legal texts and uncertainties of how to apply those in a coherent manner. However, this observation was made as a broader reference to the existing corpus of EU and international law on procedural rights, rather than strictly in connection with the Roadmap Directives. The examination of the need to undertake a codification of existing EU criminal justice law is also called for in the 2014 Communication on the EU Justice Agenda for 2020 (EC, 2014b).

Does it require new legislation? Does the EU have the competence to act?

The review and amendment of existing legislation requires a formal legal basis. Article 82(2) TFEU allows the EU to review all existing instruments. When reducing national inconsistencies the EU legislator must respect the principle of proportionality and its specific expression in Article 82(2) TFEU, which limits the scope of action to adopting Directives, rather than regulations, and minimum standards for criminal procedure. The limitation to the instrument of a Directive should require the EU legislator to leave a certain leeway to Member States as to how EU legislation is implemented as long as their objectives are met, even if this may result in some implementation inconsistencies across Member States.

What is the possible EU added value?

Action at the EU level could result in EU added value through more effective protection of procedural rights. In particular, effective and enforceable remedies are critical for ensuring protection of procedural and fundamental rights. There are cases where references to allowed derogations and remedies are included in recitals rather than in the main body of the Directive and are therefore not binding; amending the Directives to include these provisions in the main text could result in more effective protection for suspects and accused individuals. Amending the existing Roadmap Directives could also contribute to provide further guidance for EU Member States.

What are the possible challenges or limitations to this option?

The primary challenge to this policy option may lie in the generally low support for EU legislative action in the area of criminal justice among Member States (in contrast with focusing on implementation of existing legislation). However, available evidence³³¹ and interviewee testimonies on this primarily related to the adoption of new legislation – amendments to existing legislation may be more acceptable. Still, one interviewee noted that re-opening the legislative process would introduce the risk of Member States suggesting substantial modifications, which could stall the process or result in lower levels of protection than currently exist. Moreover, some of the gaps identified relate to articles of the Directives which were the most controversial and complicated to agree upon during the negotiations for the adoption of the Directive. Amending such articles is therefore likely to be extremely challenging.

³³⁰ Codification involves turning a legal act (or several acts covering related subjects) along with all its amendments into a single new act. Recasting is simpler than codification in bringing together several related acts in a single new act. However, unlike codification, recasting is a process that incorporates new substantive changes, made to the original act during the preparation of the recast text (European Commission Legal Service, 2013).

³³¹ For example, EC, 2010a

Furthermore, it is far from certain that legislative amendments would be more effective than soft measures intended to support the implementation of existing law (as discussed under Option 1). This was a point explicitly made by several interviewees, who argued that existing violations of fundamental rights protections are sometimes a result of lack of awareness and/or technical and financial resources, as well as, in some instances, a lack of political will.

In relation to harmonising the provisions on remedies, even in this context, one interviewee who felt strongly about the need to address remedies suggested that a Commission recommendation may be a sufficient solution. With regards to remedies, it should be also noted that the criminal law systems of the Member States are very different; for example, national systems evaluate/ exclude evidence obtained in breach of procedural rights in very different ways. Introducing common rules in this area could therefore be particularly challenging.

V – Enacting additional EU legislation in the area of access to justice and human dignity

- Option 5a: Expand the scope of existing EU legislation in the domain of procedural rights

This action could address in particular the following gaps:

RM4 Gaps in EU Legislation: these are gaps where the cause is the scope or coverage of legislation. It includes instances, such as PTD, where there is no EU legislation, and situations where Directives have been criticised for not covering a wide enough scope.

DC1 Detention conditions continue to fall short of required standards in numerous European countries, with overcrowding being perhaps the most widespread problem.

Concrete steps that could be taken in this area:

- Adopt new EU legislation regulating PTD.

What would this option involve?

Within the scope of this report, PTD, remedies and the rights of vulnerable adults were identified as areas where procedural rights are not currently covered by existing EU legislation. To address this gap, the EU could introduce new legislation expanding the scope of legal protection. A call to adopt EU measures to cover PTD, remedies, appeal and compensation were in fact identified (among others) as priority areas for additional EU action in the adoption of a second procedural Roadmap (Matt, 2017). All interviewees who offered their views on prioritisation (in light of the low appetite for new EU legislation among Member States) agreed that PTD was the issue they would prioritise. Fair Trials recommends a legislative measure in this field that could provide authorities with concrete step-by-step procedures through which they can ensure that the principled standards of the ECHR are made real and practical (Fair Trials, 2016e).

A Directive on PTD: a possible approach from Fair Trials

Procedure. An initial hearing evaluating the validity of arrest and deciding whether suspects and accused people will be held in PTD as a preliminary matter could happen as promptly as possible following arrest. The hearing would have the purpose only to decide on PTD and a new hearing for the suspected or accused persons would follow after. The new Directive could require prosecutors to limit their arguments in favour of detention to evidence that has already been shared with the defence. Defendants should not appear unrepresented at PTD hearings unless they have specifically, knowingly and intelligently waived the right to a lawyer.

Substance. In order to ensure that PTD is not used excessively, a threshold of possible punishment could be introduced to exempt minor offenders from the possibility of PTD. To improve the practical application of the strict grounds for PTD, legislation could propose some of the following: 1) overtly prohibit decisions to detain made exclusively on the basis of the seriousness of the offence or the length of the eventual sentence; 2) proactively require reference to be made to evidence in the case file which both parties have had an opportunity to examine; 3) clarify that any pretrial measure must be withdrawn when serious indicia of guilt or reasons for precautionary measures no longer exist; and 4) require that individualised assessments are made in relation to risks of reoffending and flight.

To ensure that PTD is used as a measure of last resort, judges could be required to state publicly in their decisions why all available alternatives are not sufficient to ensure that the defendant will appear at court and refrain from further offences or interference with the investigation. Decision-makers could be required to make reference to both the prosecution and the defence arguments to better protect equality of arms and to motivate defence counsel to improve their argumentation.

Review. Reviews could be required automatically at key junctures (e.g. monthly) and legislation could ensure that reviews are meaningful, not mechanistic. Time limits could be imposed for specific investigative acts to protect against excessive PTD and encourage special diligence, with the presumption of release applying at each application for renewal of detention.

Alternatives. Under a step-by-step approach, judges could first establish what the risk is the court seeks to prevent. Only if judges demonstrate that all available alternatives would be inadequate to address that particular risk, PTD could be imposed.

Other considerations. Member States could ensure that their domestic law provides a right to challenge unlawful PTD and an effective remedy provision. Member States could also be required to collect comprehensive data on PTD practice.

8. Source: Fair Trials, 2016e.

Does it require new legislation? Does the EU have the competence to act?

This requires legislative action. PTD, remedies in relation to procedural rights and protections for vulnerable adults all fall within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU. All the areas listed above form part of how the state treats individuals in criminal procedure.

What is the possible EU added value?

In comparison with action at the Member State level, action at the EU level could result in increased and more effective protection of fundamental rights through the introduction of common safeguards and the monitoring of their implementation by the Commission. Legislation can bring the benefit of a simple, coherent restatement of ECHR standards that is easier for prosecutors, lawyers and judges to apply and defendants to understand (Fair Trials, 2016e), as well as the benefit of the potential direct effect if future legislation was via a directive.

What are the possible challenges or limitations to this option?

While the question of EU competence in the area of procedural rights appears to be largely settled, there appears to be little appetite among Member States for new EU legislation. This is evidenced, among other sources, by Member States responses to the Green Paper on detention (EC, 2011a). The lack of appetite among Member States was also mentioned frequently by our interviewees. Although, as the co-legislator, the EP has called for additional legislation (for example, in relation to detention conditions and PTD, in light of this reluctance on the part of

Member States to proceed with new legislation, interviewees either suggested prioritising only selected new measures (PTD) or focusing on ensuring correct implementation of already existing legislation.

Along a similar line of reasoning, one interviewee argued that PTD is inextricably linked to presumption of innocence and could therefore be addressed by an amendment to the corresponding Directive (which currently excludes PTD), rather than requiring a new instrument.

- **Option 5b: Introduce minimum EU standards on detention conditions**

This action could address in particular the following gap:

DC1 Detention conditions continue to fall short of required standards in numerous European countries, with overcrowding being perhaps the most widespread problem.

Concrete steps that could be taken in this area:

- Introduce minimum EU standards on detention conditions.

What would this option involve?

One measure that could improve detention conditions is to introduce EU common standards applicable in detention facilities. This course of action is explicitly mentioned, among other sources,³³² in the 2017 EP resolution on prison systems and conditions (EP, 2017a and 2017c). This resolution also called on Member States to adopt a European prison charter, in line with CoE's 2004 recommendation (Council of Europe Parliamentary Assembly, 2004). While the EP report does not comment on the scope of any EU common minimum standards, the CoE's 2004 recommendation, which expressly calls for the European prison charter to be drawn up in conjunction with the EU, provides a list of areas to be covered by binding rules.³³³ These include:

The right of access to a lawyer and a doctor during PTD and the right for persons held pending trial to notify a third party of their detention.

Detention conditions.

The right of access to internal and external medical services.

Activities geared to rehabilitation, education and social and vocational reintegration.

The separation of prisoners.

Specific measures for vulnerable categories of prisoners.

Visiting rights.

Effective remedies enabling prisoners to defend their rights against arbitrary sanctions or treatment.

Special security regimes.

Promoting non-custodial measures and informing prisoners of their rights.

In practical terms, such action would result in the elevation of existing international standards, notably the EPR, so that they took on a binding character enforceable through the CJEU.

³³² Other sources include for instance, a testimony by Vivian Geiran, Director of the Probation Service, Ireland, to the EP LIBE (Committee on Civil Liberties Justice and Home Affairs, 2017).

³³³ The CoE resolution in turn makes a reference to an earlier EP report from 2003, which also called for the establishment of a European prisons charter. The report suggested that failure to do so or unsatisfactory results of this effort should lead to the EU drawing up a binding Charter of the rights of persons deprived of liberty (EP, 2004).

In parallel with regulating detention conditions, existing literature (Council of Europe, 2016) and several interviewees stressed the importance of addressing the factors that give rise to inadequate detention conditions in the first place. Chief among these is the currently high use of PTD and its contribution to prison overcrowding. In addition to adopting an EU legislative instrument on PTD (see Option 5a), a series of non-legislative options have been put forward in existing literature and by interviewees alike. It is also in line with Member States' preferences as indicated in their responses to the Green Paper on detention (EC, 2011a).

Similar to soft measures listed under Option 1, possible steps in this area include:

- Raising awareness among judges about existing alternatives and tools, including FD ESO and FD PAS (in particular to address issues with detention of foreigners).³³⁴
- Establishing a database with contact information for relevant authorities in individual Member States and data on relevant national laws.
- Providing financial and technical support to NGOs active in the promotion of alternatives to detention.
- Facilitating utilisation (and raising awareness of the option to do so) of European regional and cohesion funds to finance improvements in detention conditions in existing prisons.³³⁵
- Training prison staff (including in the provision of physical and mental health services).
- Providing support to researchers working on academic studies of alternatives and their effectiveness, e.g. through dedicated calls under existing EU funding mechanisms such as the Justice Programme.³³⁶

In relation to each of these soft measures, we are aware that there are already some activities ongoing. For instance, as discussed under Option 3a, a handbook for FD PAS is in development and FRA are engaged in a project on developing a one-stop shop database on alternatives to detention and other relevant information (FRA, 2016c). The European Prisons Observatory, funded through the EU's Justice Programme, has worked to promote alternatives to detention, not least through the development of a practitioner handbook (Heard, 2016) and country-specific reporting by the Observatory. However, interviewees and the literature reviewed have identified an ongoing need for these activities, including the need for them to be enhanced or extended.

Does it require new legislation? Does the EU have the competence to act?

This requires new legislation and hence a formal legal basis. Article 82(2)(b) TFEU specifically refers to the rights of individuals in criminal procedure, and, as explained in Chapter 1, it is not clear from this wording whether this covers post-trial detention conditions. The Stockholm Programme and the 2009 Roadmap on Procedural Rights appear to allow for this reading. The EP formally called on legislative action in this regard. The cases of *Aranyosi and Căldăraru* (2016) highlight that, in practice, detention conditions may constitute an obstacle to Member State

³³⁴ When the ESO was applied for the first case only in 2015 following two separate applications, neither the judge nor the prosecution was aware of the FD ESO, and from the outset, the case was adjourned to allow for consideration and better understanding its implications (Tomkin et al., 2017).

³³⁵ Funding support from the Commission plays an important role also in the development of rehabilitation and deradicalisation programmes. See, e.g. the 2017 EP resolution on prison systems and conditions (EP, 2017a) as well as the contribution of Commissioner Jourova to the corresponding plenary debate (EP, 2017c).

³³⁶ The last point is in line with an observation made by an interviewee, who felt that the involvement of the academic community in the area of detention conditions and procedural rights remains relatively limited and confined to a small number of individuals and organisations.

compliance with mutual recognition instruments, such as the EAW. The CJEU did not distinguish between pre- and post-trial detention in its rulings.

What is the possible EU added value?

The adoption of an EU binding instrument would enable the Commission to follow up and enforce existing detention condition standards. This will in turn contribute to the strengthening of mutual trust in the EU and greater functioning of the principle of mutual recognition. Action at the Member State level has not proven effective in ensuring compliance with existing international standards.

What are the possible challenges or limitations to this option?

One interviewee suggested the adoption of binding standards might be counterproductive and actually result in lower levels of protection than is currently the case. The rationale behind this argument is that any legislative negotiations may lead to Member States agreeing to less comprehensive common standards than are currently expressed in the EPR. Similarly, another interviewee noted that the appeal of some international legal standards, such as GRECO or Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), was derived from their non-binding nature and another added that elevating standards to a higher binding character does not necessarily result in higher rates of compliance. Ultimately, one interviewee argued that violations of existing standards probably do not occur as a result of insufficient political will but are rather attributable to insufficient financial and technical resources and/or lack of awareness.

Vermeulen et al. (2011) also made a political argument against the introduction of common EU standards, suggesting it would be difficult to obtain Member States support (even if tied strictly to the mutual recognition framework)³³⁷ and might prompt some Member States to question EU competence in this area. Instead, the authors suggested that the introduction of a motivational duty in FD TOP proceedings (see Option 4a) may result in greater pressure on Member States to conform with existing international norms and standards.

Lastly, one interviewee, while supportive of introducing binding detention standards, stressed that the effectiveness of any new binding instrument may depend on the willingness and ability to use available enforcement mechanisms. In this regard, the interviewee noted that in some countries the situation on the ground remains unsatisfactory despite the existence of national prison standing orders.

VI – Chapter summary and key findings

Drawing on the literature, interviews and consultation with expert advisors, policy options were identified that may address the gaps outlined in Chapters 2-4 of this report.

The possible policy options fall into five broad themes, with up to three policy options in each. The policy options include some which would require new EU legislation, but most are non-legislative and relate to supporting the implementation of existing mechanisms, modifying or improving (and increased use of) existing monitoring mechanisms at the EU and international level, or the better collection and dissemination of systematic information to allow further

³³⁷ This connection to the mutual recognition framework would in turn risk introducing a different level of protection for detained people depending on the nature of the proceedings.

assessment of the scale of the procedural rights challenges and to inform decision-making in national courts. Overall, the study found that there is little appetite among Member States for substantial new EU legislation in the area of procedural rights and some interviewees urged caution in re-opening existing legislation for re-drafting in case this actually resulted in lower standards of procedural rights protections in any revised text.

In relation to post-trial detention conditions, it is not clear if the EU has the competence to legislate to introduce common standards. Although PTD falls within the meaning of rights of individuals in criminal procedure within the meaning of Article 82(2)(b) TFEU, it is not clear whether this should be interpreted restrictively so that post-trial detention is left out of the scope. Still, the EP called on the Commission to introduce minimum standards for prison and detention conditions.

A cross-cutting limitation relevant to many of the policy options is that it is hard to assess the extent to which they would result in improved procedural rights and detention conditions. The limited evidence we have collected about the barriers to improvements (the reasons why procedural rights are not protected) indicate that financial resources and the culture, training and skills of legal professionals are the key factors to overcoming many of the barriers, highlighting the importance of sharing best practice and capacity building.

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Appendix A: Qualitative assessment of the impact of gaps relating to the mutual recognition instruments

Table 9 provides the detail of the qualitative assessment of the gaps identified in the mutual recognition instruments in Chapter 2 of this report.

As explained in Chapter 5 Section II, the approach to doing this was to articulate a likely scenario for each gap, thinking about how it was most likely impact in a particular case. Each scenario was then categorised according whether the gap or barrier constitutes a *de facto erosion* of the right, or whether it is a *de facto denial* of the right.

In making the assessment, the research team did *not* take into account how common the gap was (i.e. in how many Member States or cases), since data to support such an assessment are not available. We simply asked the question: in a case where this gap was experienced, what would be the *likely* de facto impact on the individual?

Of course, the same gap could have quite different consequences for individuals, depending on their circumstances, needs and the particulars of the case. In the absence of better data, the assessment is intended to provide a starting point for understanding relative impacts at the individual level.

■ **Table A1: qualitative assessment of the gaps identified in the mutual recognition instruments**

Gap identified in Chapter 2	Type of issue	Possible scenario of most likely possible impact suggested by the research team	Categorisation of impact at individual level in terms of protecting fundamental rights and freedoms
Limited ability to refuse execution on fundamental rights grounds in all but the EIO.	EU legislation	Might result in a violation of ECHR, including through constituting degrading treatment and excessive use of PTD.	De facto denial
Assessments of detention conditions needed for the EAW and TOP are rarely conducted and difficult in practice.	Implementation	Might result in a violation of ECHR if this results in an individual being held in conditions following the use of an EAW/TOP that constitute degrading treatment.	De facto denial
Underuse of ESO and PAS.	Implementation	Might result in unnecessary deprivation of liberty.	De facto denial
Consent to a transfer is not always needed or is implied.	EU legislation and implementation	Might result in reduced prospects for an individual's social rehabilitation. This would run contrary to the objective of the FD but would not necessarily constitute a severe violation of fundamental rights.	De facto denial

Procedures to ensure information, understanding and translation regarding transfer of persons are not specified in FD TOP, ESO and PAS.	EU legislation	Might result in individuals being prevented from accruing potential benefits stemming from the use of the FD (e.g. by not being aware of or not understanding their options). It may also exacerbate the effect of other gaps. This would run contrary to the objective of the FD, but would not constitute a severe violation of fundamental rights.	De facto denial
Rights to appeal transfers are not included in any of the FDs.	EU legislation	Might result in lack of ability to challenge a transfer that puts the individual in a worse position (e.g. in terms of prison conditions or social rehabilitation). This could contravene the objective of the FD.	De facto erosion
Proportionality in the EAW and EIO.	EU legislation and Implementation	Might result in a violation of the ECHR rights, and/or through excessive use of PTD.	De facto denial
Cost to Member State of using EAW.	Implementation	Might result in reduced chances that a Member State makes use of the EAW in any particular case – but the impact is not primarily at the individual level.	N/A
Inconsistent consideration of factors contributing to social rehabilitation in relation to FD TOP.	Implementation	Might result in a transfer that does not result in improved social rehabilitation prospects for the sentenced individual. This would run contrary to the objective of the FD, but would not constitute a severe violation of fundamental rights.	De facto erosion
Risks of a de facto deterioration of prisoner's situation in relation to FD TOP.		Might result in a situation where an individual is detained in poorer conditions, with no guarantee that such a deterioration could automatically stop the transfer. Poorer conditions could potentially result in a violation of the ECHR, including through constituting degrading treatment and excessive use of PTD.	De facto denial
Not all Member States include specific measures to protect vulnerable persons in relation to FD TOP.	Implementation	Might result in a violation of ECHR through constituting degrading treatment.	De facto denial

<p>Lack of understanding and knowledge of the FD TOP among practitioners.</p>	<p>Implementation</p>	<p>Might result in correct use of the FP being hampered (e.g. attempts to use transfers when not authorised). It may also contribute to other gaps applicable to the FD (e.g. lack of systematic checks on detention conditions in other Member States). On its own, however, it is not likely to result in severe violations of fundamental rights</p>	<p>De facto erosion</p>
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Appendix B: Expenditure on prison administration in Member States

■ Table B1: Total budget spent by prison administration (2014 data)

Member State	Expenditure (€)
Austria	€ 416,973,092
Belgium	€ 594,640,286
Bulgaria	€ 58,899,382
Croatia	€ 71,427,935
Cyprus	€ 15,279,577
Czech Republic	€ 283,200,000
Denmark	€ 411,000,100
Estonia	€ 43,671,208
Finland	€ 197,258,000
France	€ 2,523,691,845
Germany	€ 3,023,411,535
Greece	€ 108,879,000
Hungary	€ 191,196,858
Ireland	€ 388,890,900
Italy	€ 2,714,126,966
Latvia	€ 41,454,507
Lithuania	€ 58,728,000
Luxembourg	€ 50,867,880
Malta	N/A
Netherlands	€ 975,656,411
Poland	N/A
Portugal	€ 212,941,499
Romania	€ 230,012,271
Slovakia	€ 150,579,357
Slovenia	€ 33,235,081
Spain	€ 1,115,627,895
Sweden	€ 720,694,750
United Kingdom	€ 4,118,445,697

Source: 2015 SPACE statistics

Note: Data provided to the CoE by Member States' prison administrations. In parallel, SPACE also calculates total amount likely to have been spent for all categories of inmates in 2014. In several instances, this number differs notably from the total spend reported by state prison administrations. For Poland, data from the state administration are not available. The SPACE estimate of total spend is approximately €437 million. Data reported for UK are an aggregation of England and Wales, Scotland and Northern Ireland.

Appendix C: Qualitative assessment of the impact of gaps relating to the Roadmap measures

The table below provides details of the qualitative assessment of the gaps identified in the Roadmap measures in Chapter 3 of this report.

The approach and limitations are as described in Appendix A.

In the table, the gaps are clustered as follows:

- RM 1. **Costs incurred to suspects and accused persons.** A number of the gaps related to a situation where a suspect might be charged (for example, for copies for information).
- RM 2. **Extensive grounds for refusal/ derogation.** These are gaps where the Directive or national implementation allows for many situations in which the duty to provide for the right does not apply.
- RM 3. **Ineffective remedies.** Gaps related to the lack of ability to appeal or claim compensation for lack of protection of rights.
- RM 4. **Gaps in EU legislation.** These are gaps where the cause is the scope or coverage of legislation. It includes instances, such as PTD, where there is no EU legislation, and situations where Directives have been criticised for not covering a wide enough scope.
- RM 5. **Actions are non-binding.** These are gaps related to the recommendation on procedural safeguards for vulnerable adults.
- RM 6. **Implementation means rights are not protected in practice.** The category includes a larger number of gaps than the others. All of the gaps here are examples where the way in which the safeguards or measures are implemented in practice does not match expectations in the Directives or does not, in practice, protect the rights. It includes gaps relating to the quality of services such as legal aid and translation, and the timeliness of the protection provided, such as the provision of the Letter of Rights.
- RM 7. **Lack of practitioner knowledge.** This is a cross-cutting barrier, relevant to many gaps.
- RM 8. **Variation between Member States in implementation.** Gaps where the Directive leaves scope for Member States to decide on matters, resulting in different practices in different Member States.

■ **Table C1: qualitative assessment of the gaps identified in the Roadmap measures**

Roadmap measure	Gap identified in Chapter 3	Possible scenario of most likely possible impact suggested by the research team	Categorisation of impact at individual level in terms of protecting fundamental rights and freedoms	Categorisation of gap								
				RM1	RM 3	RM 3	RM 4	RM 5	RM 6	RM 7	RM 8	
Interpretation and translation	Different approach to essential documents for translation: some Member States do not list them, limited understanding of what counts; because of budget and time constraints, oral rather than written translation is provided.	Might result in crucial documents not being provided in written translation.	De facto denial									✓
Interpretation and translation	Lack of systematic approaches to ascertain the necessity of translation/interpretation.	Might result in individuals (especially vulnerable people) who need interpretation/translation not getting it at all.	De facto denial									✓
Interpretation and translation	Lack of safeguard for the confidentiality of communication between suspected or accused persons and their legal counsel when using interpreters.	Might result in individuals receiving enough translation/interpretation to understand proceedings, but this is not confidential.	De facto erosion				✓					
Interpretation and translation	Not all Member States have included a legal right both to challenge a	Might result in individuals receiving enough translation/interpretation	De facto erosion			✓						

	decision and complain about quality; and ineffective remedies, such as often not replacing interpreter/translator if quality is challenged.	to understand proceedings, but this could be clearer, quicker, etc., and limited ability to challenge/improve the service provided.										
Interpretation and translation	Inadequate quality of translation and interpretation.	Might result in individuals receiving enough translation/interpretation to understand proceedings, but could be clearer, quicker, etc.	De facto erosion						✓			
Legal aid	Lack of application to people who are not deprived of liberty.	Might result in individuals being deprived of liberty and not having access to legal aid at all.	De facto denial				✓					
Legal aid	No provision of emergency legal advice.	Might result in individuals not having access to legal aid at all while awaiting a decision (at a possibly crucial point in the criminal justice process).	De facto denial				✓					
Legal aid	Inconsistent eligibility test in the EAW.	Might result in some confusion and inconsistencies about the right to legal aid generally and the application of this right in EAW cases.	De facto erosion				✓					
Legal aid	The cost of providing legal aid may inhibit implementation.	Might result in individuals having access to legal aid, but a limited provision.	De facto erosion	✓								
Presumption of innocence	Directive does not reflect requirements of the ECHR and its case law.	Might result in individuals not benefiting from presumption of innocence in situations where the	De facto denial				✓					

		ECHR demands it.										
Presumption of innocence	Lack of application to people who become suspects during an investigation.	Might result in individuals who become suspects during an investigation not benefiting from presumption of innocence.	De facto denial				✓					
Presumption of innocence	Possible creation of perverse incentives to plead guilty.	Might result in a situation where, in practice, individuals feel unable to exercise their right to be presumed innocent.	De facto denial						✓			
Presumption of innocence	Application to natural persons only.	Lack of applicability to legal persons not likely to seriously infringe the rights of individuals.	De facto erosion				✓					
Pretrial detention	PTD is not used as a last resort, PTD imposed on the basis of severity of alleged offence, reviews of PTD are absent, infrequent or cursory, and limits on the length of PTD vary, PTD is disproportionately used against non-nationals and non-residents.	Might result in individuals being denied these basic safeguards and PTD being used when these standards are not met. Might result in discrimination against non-nationals.	De facto denial				✓					
Right of access to a lawyer	The scope of the derogations is overly broad and open to abuse.	Might result in individuals not having access to a lawyer at all.	De facto denial		✓							
Right of access to a lawyer	Advocacy is often passive or non-existent due to financial compensation and workload.	Might result in individuals effectively having no lawyer (if very passive).	De facto denial						✓			
Right of access to a lawyer	Waiving the right of access to a lawyer.	Might result in individuals not having access to a lawyer at all, for example,	De facto denial						✓			

		during police questioning											
Right of access to a lawyer	Weak remedies.	Remedies are sought after the fact, so might not have an impact on the access to a lawyer. However, might result in limited ability to see a remedy where a person is challenging decision-making around access to a lawyer.	De facto erosion			✓							
Right of access to a lawyer	In some Member States there are limits to the role permitted to lawyers during questioning of suspects.	Might result in access to a lawyer, but for only some parts of proceedings.	De facto erosion		✓								
Right to information	Lack of safeguards for vulnerable individuals.	Might result in important information not being understood by vulnerable individuals.	De facto denial				✓						
Right to information	Some Member States seem to allow extensive grounds for refusal to access materials of the case at the pretrial stage.	Might result in information about some rights not being provided at all at the pretrial stage.	De facto denial		✓								
Right to information	Challenges, difficulties and differences in accessing the materials, and in the timing for individuals already in detention.	Might result in crucial documents not being provided for those in detention, who are therefore already in a vulnerable position.	De facto denial							✓			
Right to information	Extent, format, communication and temporal scope of the rights are not consistent across the Member States.	Might result in information about some rights not being provided at all.	De facto denial										✓

Right to information	Letters of Rights do not always cover all the rights prescribed by the Directive.	Might result in information about some rights not being provided at all, and/or information about rights not being provided at important stages of the criminal justice process.	De facto denial						✓		
Right to information	The Letter of Rights for suspects or accused persons who are arrested or detained are not always provided in a timely way (i.e. before questioning).	Might result in information about some rights not being provided at all, and/or information about rights not being provided at important stages of the criminal justice process.	De facto denial						✓		
Right to information	Costs.	Might result in information not being provided, but individuals have to pay a small fee.	De facto erosion	✓							
Right to information	Some Member States do not have a specific Letter of Rights for the EAW, as prescribed by the Directive.	Might result in information about rights being received, but this is not specific to the EAW.	De facto erosion						✓		
Right to information	The information provided is often not clearly understandable	Might result in information about rights being provided, but not all of it is clear.	De facto erosion						✓		
Safeguards for children	The Directive does not apply to minor offences or non-criminal proceedings.	Might result in no protections for children in minor cases.	De facto denial				✓				
Safeguards for children	The Directive has no requirement of mandatory representation by a lawyer.	Might result in complete lack of representation by a lawyer.	De facto denial				✓				

Safeguards for children	There are few provisions concerning the need for an adult to be involved in the proceedings.	Might result in a child having no support from parent or guardian, which is seriously detrimental to the interests of a child.	De facto denial				✓				
Safeguards for children	The Directive allows derogation from the duty to provide an assessment.	Might result in children not receiving the support they need.	De facto denial		✓						
Safeguards for children	Complex issues are not addressed in sufficient details.	Might result in variation in practice within Member States, where services may differ.	De facto erosion				✓				
Safeguards for children	Relevant definitions are lacking.	Might result in variation in practice within Member States, where services may differ.	De facto erosion				✓				
Vulnerable adults	The instrument is not binding.	Might result in the rights of vulnerable individuals not being protected at all.	De facto denial					✓			
Vulnerable adults	Member States do not have detailed rules or guidance for practitioners.	Might result in variation in practice within Member States, where services may differ.	De facto erosion						✓		

1.1 Appendix D: Methodological approach to calculate the impacts of PTD

In order to estimate the impacts of PTD, we developed a bottom-up cost modelling approach based on breaking down the total potential impacts in the form of costs borne by different actors. The ultimate goal of the approach is to derive an estimate of the cost per day of having an individual detained pretrial that goes beyond the direct cost to the public of having an individual in detention, including subsistence, staffing and operational costs of operating prisons or PTD facilities. The advantage of such a bottom-up modelling approach is that it provides an overview of the monetised impact components and the framework that they are embedded in, allowing policymakers to see individual components in broader perspective. The methodological framework is outlined in the figure below.

Figure D1: Cost modelling framework

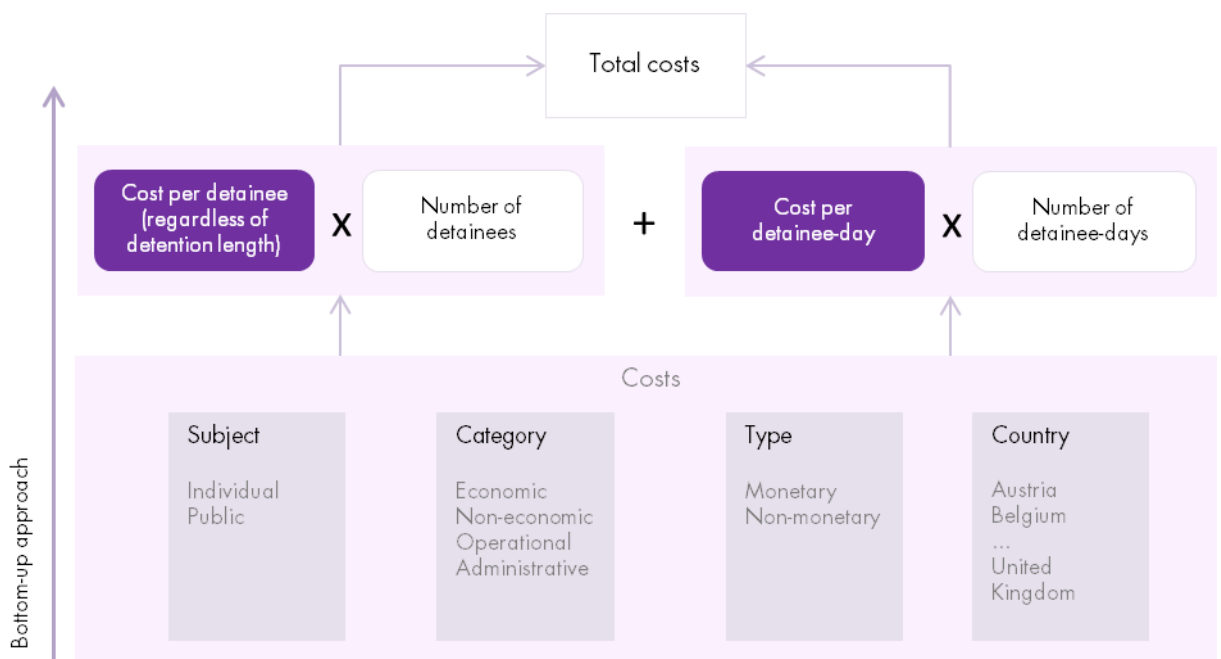


Table D1 provides examples for some of the impacts associated with PTD, either at the individual or the public level. These impacts can be further divided into economic or non-economic impacts with a direct or indirect impact on the individual.

■ **Table D1. Categorisation of adverse outcomes**

Subject	Category	Type	Relation	Impact
Individual	Economic	Monetary	Direct	Loss of earnings/job loss
				Cost of private defence counsel
			Indirect	Impaired career progression
				Stolen or lost belongings

		Non-monetary	Direct	Need to arrange service for dependents	
			Indirect	Loss of employment/business failure	
		Monetary	Direct	Increased probability of reoffending	
			Indirect	Lower educational attainment	
	Non-economic	Monetary	Direct	Need to visit a specialist	
			Non-monetary	Direct	Emotional distress
					Mental health problems
					Physical health problems
		Indirect		Lower quality of life/loss of life	
				Lower trust in institutions	
				Damaged reputation	
				Loss of home, family or friends	
	Public	Operational and administrative	Monetary	Direct	Subsistence costs
					Staffing costs
Other operational costs					
Fixed costs of constructing/running jails					
Indirect			Compensation to individuals		
Non-monetary			Direct	Longer trial processing times	
		Indirect	Higher staff turnover and absence rates		
Economic		Monetary	Direct	Productivity loss	
				Tax losses	
		Indirect	Increased probability of reoffending		
Societal	Monetary	Direct	Cost of resocialisation of offenders		
	Non-monetary	Direct	Adverse effect on individual's community ³³⁸		
		Indirect	Lower trust in institutions		
			Impaired cooperation and mutual trust between states; low use of mutual recognition instruments		

Since the individual impact categories vary in definition, a common denominator used for their scaling up must be identified. Most of the impacts highlighted in Table 12 are directly related to individual detainees and prosecution processes. Hence, the number of pretrial detainees and detainee-days (the number of pretrial detainees multiplied by the number of days they spend in detention) thus appear to be the optimal scale-up factors. To that end, cost estimates available at the aggregate level, such as the costs of prison maintenance, need to be related to the total respective population of pretrial detainees (or the total number of prisoners if more detailed data is not available). Assessing the cost at the detainee or detainee-day level is also useful for potential scenario analysis as it allows

³³⁸ This may include long-term negative effects on partners or children who may be more likely to experience financial hardship or lack of emotional support.

effortless comparison of costs in case fewer individuals were put in pretrial detention or if the length of detention was shortened.

While the list of impacts in Table D1 is large, due to imperfect data coverage and inherent uncertainty in the model, only a subset of the identified impacts can be estimated in a quantitative manner with a reasonable degree of certainty. Hence, costs that cannot be easily quantified (such as the impact of PTD on mental health of detainees) or costs with no suitable existing data to represent them are not included in the model. Specifically, we focus on the following impact/cost factors:

- Cost to the public in the form of maintaining prison or PTD facilities, including subsistence costs, staffing and operational or administrative costs.
- Individual loss of earnings and property due to loss of liberty while being held in PTD.
- Costs to the public in the form of compensation paid for individuals acquitted.

By including not all potential impact or cost factors in a quantitative manner, the resulting cost estimates form a theoretical lower bound of an interval in which the actual costs lie. In other words, the actual costs are likely to be substantially higher than the estimates presented.

In what follows the data sources used and some descriptive statistics regarding the scope and scale of PTD in Europe is presented. This is followed by a description on the how the different elements of cost and impact factors included in the modelling approach are quantified, with an emphasis on the assumptions made in determining them.

Data sources and descriptive statistics

- Data sources

Overall, the availability, applicability and accuracy of data related to PTD and procedural rights are relatively scarce, with little homogenised cross-country coverage and regular updates. Where possible, the analysis utilises data from publicly available databases maintained by international organisations, particularly the CoE SPACE I data (Council of Europe, 2017h), Eurostat, UNDOC (UNODC, n.d) or the World Bank. The main advantage of using these is data consistency and coverage across periods and countries. To obtain the missing information, we further searched the academic and grey literature (research produced outside of the traditional distribution channels), which offers the exact opposite upsides and downsides: high degree of relevance to the investigated topic but often at the cost of very limited scope and/or analysed population, lack of regular updates and various levels of replicability. Where neither of the source types offered any relevant data, appropriate proxies were used.

Fortunately, the cross-sectional nature of the analysis presented in this report mostly requires just a single observation per country rather than a longitudinal dataset. If a dataset spanned multiple years, we always used the latest available observation (this applies also for missing observations for some country-year pairs, which were replaced

by the latest non-missing observation for given country). For individual studies, we assessed the relevance of data (in terms of methodology and studied population) against time passed since their publishing and chose the most appropriate data.

- Scale of PTD

Table D2 depicts the large variation in the average length of PTD, the total number of persons held in PTD as well as their relative number in the total detained population across Member States. This is useful to put both the number of detainees and the length of detention in perspective as some countries may have low number of pretrial detainees but keep them in detention for very long, or the opposite. The latest consistent cross-country data on PTD length is from the 2015 Space I data (Aebi et al., 2017) and a European Commission report from 2006 (European Commission 2006b). A comparison of average length of PTD between the countries available in the European Council (2016) and newer 2015 data from Space I survey reveals that the length of PTD has been constant over time across the Member States. In addition, some country-specific reports from Austria, Czech Republic or France (Austrian Parliament, 2014, Czech Statistical Office, 2012, Sous-Direction de la Statistique et des Etudes, 2016) suggest that the figures have not changed substantially since then. By contrast, the number of detainees by country using in the analysis is rather up-to-date, showing data from 2015 (or 2014 where 2015 data was not available).

■ **Table D2: Scale of PTD**

Country	PTD length (days)	Number of detainees	Share prison population
Austria	68	1,848	20%
Belgium	80	3,314	26%
Bulgaria	165	690	9%
Croatia	165	719	22%
Cyprus	165	97	15%
Czech Republic	150	2,185	10%
Denmark	55	930	26%
Estonia	120	605	22%
Finland	120	640	21%
France	116	17,030	26%
Germany	120	13,713	22%
Greece	365	2,557	27%
Hungary	364	4,400	25%
Ireland	60	575	15%
Italy	180	17,169	33%
Latvia	365	1,376	31%
Lithuania	120	942	12%
Luxembourg	150	283	42%
Malta	165	89	16%
Netherlands	120	4,215	43%
Poland	165	500	1%
Portugal	365	2,330	16%

Country	PTD length (days)	Number of detainees	Share prison population
Romania	270	2,588	9%
Slovakia	213	1,363	14%
Slovenia	120	231	17%
Spain	180	8,636	13%
Sweden	30	1,542	27%
United Kingdom	60	10,724	11%

Source: SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015; European Commission (2006) and UNODC.

Note: PTD length entries highlighted in green stem from the 2015 Space I data; entries highlighted in yellow stem from the European Commission (2006) paper; and entries in red have been imputed using the average length of PTD across all countries, as no official data could be retrieved for these countries.

Looking at the figures, we can see large variation across countries in both the PTD length and number of detainees. In particular, pretrial detainees in Austria, Denmark or the UK are likely to spend up to eight times fewer days in detention than in countries such as Greece, Hungary or Latvia. Given the high correlation between length of detention and number of detainees, the same sets of countries also show relatively low/high number of pretrial detainees as a share of the total population.

Quantification of impacts

The following section is aligned with the framework presented in Table D1 and presents (cost) estimates for some of impact categories included in the model. Whenever possible, the quantified impacts are provided at a national level. Otherwise, missing data are imputed from existing estimates using various micro- or macro-economic indicators such as price level differences or real wages. In those instances where data is not available for every country, we impute the missing values using the EU average. For instance, this applies to the average length of PTD for the countries in Table D2 where the information is missing.

- **Direct cost to the public in the form of maintaining prison or PTD facilities, including subsistence costs, staffing and operational or administrative costs**

Data on direct cost of PTD for authorities is taken from the CoE 2015 SPACE I data and cross-checked with national data sources such as the UK Ministry of Justice (MoJ) (UK Ministry of Justice, 2016, Prison Service of the Czech Republic, 2015). The data reflects the situation in 2014 and, in what follows, we adjust them for inflation and changes in real wages to reflect how they may have changed since then. The estimates are presented in Table D3. We can see that even though the pretrial specific information is often unavailable, the existing figures closely follow the overall expenses per detainee.³³⁹

³³⁹ Except for Bulgaria, where the reported costs are substantially higher, raising questions about the limitations and reliability of this data.

Hence, in what follows we use the general expenses per detainee as substitutes for the PTD-specific data.

■ **Table D3. Average amount spent per day for the detention of one person in 2014 (PTD-specific data in the parentheses)**

Austria	€113.0 (-)	Greece	€28.2 (-)	Norway	€348.0 (-)
Belgium	€137.3 (-)	Hungary	€26.6 (-)	Poland	- (€22.5)
Bulgaria	€13.7 (€60.9)	Ireland	€189.0 (€189.0)	Portugal	€41.2 (-)
Croatia	€7.3 (€6.6)	Italy	€141.8 (-)	Romania	€19.8 (-)
Czech Republic	€45.0 (-)	Latvia	€22.6 (-)	Slovakia	€39.4 (-)
Denmark	€191.0 (-)	Liechtenstein	€230.0 (€315.0)	Slovenia	€60.0 (-)
Estonia	€39.4 (-)	Lithuania	€16.1 (€18.3)	Spain	€59.7 (-)
Finland	€175.0 (-)	Luxembourg	€206.5 (€206.5)	Sweden	€354.0 (€404.0)
France	€102.7 (€90.3)	Malta	-	Switzerland	-
Germany	€129.4 (-)	Netherlands	€273.0 (€253.0)	UK	€117.7 (€125.0)

9. Source: SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015

Individual loss of earnings and property due to loss of liberty while being held in PTD

An additional impact incurred by an individual placed in PTD comes from their incapacity to generate revenue by going to work. This opportunity cost primarily depends on the individual being employed or not. Using data from Eurostat on net labour earnings and the average employment rate (approximately 37 per cent) of people entering PTD provided by Dobbie et al. (2016), we estimate the average monthly earning loss.³⁴⁰

The results are presented in Table D4. We can see that PTD is estimated to cost an individual an expected earnings loss of between €62 to €713 per detainee and month, respectively, depending on the country.

■ **Table D4. Average net earning losses**

<i>Country</i>	Average earning loss / detainee				
	<i>per month</i>	<i>per day</i>	<i>Country</i>	<i>per month</i>	<i>per day</i>
Austria	€ 519.49	€ 17.32	Italy	€ 392.73	€ 13.09
Belgium	€ 540.76	€ 18.03	Latvia	€ 111.90	€ 3.73
Bulgaria	€ 62.60	€ 2.09	Lithuania	€ 105.59	€ 3.52
Croatia	€ 147.9	€ 4.93	Luxembourg	€ 713.12	€ 23.77
Cyprus	€ 434.66	€ 14.49	Malta	€ 290.80	€ 9.69
Czech Republic	€ 151.11	€ 5.04	Netherlands	€ 623.69	€ 20.79
Denmark	€ 544.32	€ 18.14	Poland	€ 122.68	€ 4.09
Estonia	€ 161.56	€ 5.39	Portugal	€ 243.59	€ 8.12

³⁴⁰ Note that the average earnings per month is calculated by multiplying the average net earnings for the full population by multiplying it with the average employment rate for pretrial detainees which is about 37 per cent Dobbie, W., Goldin, J. & Yang, C. 2016. *The effects of pre-trial detention on conviction, future crime, and employment: Evidence from randomly assigned judges Working paper*, https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

Finland	€ 546.35	€ 18.21	Romania	€ 75.15	€ 2.50
France	€ 472.24	€ 15.74	Slovakia	€ 137.64	€ 4.59
Germany	€ 497.43	€ 16.58	Slovenia	€ 217.42	€ 7.25
Greece	€ 270.03	€ 9.00	Spain	€ 362.17	€ 12.07
Hungary	€ 100.37	€ 3.35	Sweden	€ 566.78	€ 18.89
Ireland	€ 517.37	€ 17.25	United Kingdom	€ 587.73	€ 19.59

Sources: Eurostat [earn_nt_net] ; (Dobbie et al., 2016)

While we cannot directly quantify the individual loss, it is important to highlight that aside the direct loss of earnings, and given the often lengthy period away from their jobs, the probability that pretrial detainees will be unemployed once out of detention is high. As explained in Dobbie et al. (2016), defendants released pretrial are on average 5.1 per cent more likely to be employed within the two years following the bail hearing and 3.6 per cent more likely to have any income than defendants placed in PTD.³⁴¹

Furthermore, for the individual, additional costs of being held in PTD may include impaired career progression, or the need to arrange services for dependents, such as young children. Given the lack of data on distribution of pretrial detainees in terms of their carer status, we are unable to assess the last item. With regard to impaired career progression, Western (2002) argues that incarceration reduces ex-inmates' access to the steady jobs that usually produce earnings growth among young men and supports the argument with data from the US National Longitudinal Survey of Youth, showing that incarceration may reduce wages by up to 20 per cent. However, without very detailed cross-European information about the specific characteristics of the PTD population, it is difficult to model these effects.

In addition, Miller et al. (1996) found that many of detainees had their property, for example mobile phones, jewellery or cash, damaged or stolen, with average loss around \$370 per incident (approximately €454 in 2017 value)³⁴². Baughman (2017) assumes that as many as one-third of pretrial detainees are affected this way. In order to remain conservative, we assume the probability to be 20 per cent instead, giving us average cost of €91 per detainee. In order to get an estimate per day, we divide this figure by the average number days in PTD.

- **Costs to the public in the form of compensation paid for individuals acquitted**

This category principally considers compensation to detainees who are subsequently acquitted and claim compensation for lost wage and moral damage. Alternatively, detainees may also seek compensation for breach of law concerning PTD itself. Appendix 2 to the Fair Trials International report (Fair Trials, 2016e) shows that most of the EU Member States offer compensation, although its extent and amount varies by country.

³⁴¹ Note that the study was conducted in US settings and the results may therefore not be fully applicable for European countries due to differences in the detention legislation.

³⁴² Assuming the average 1996 exchange rate of 0.788 EUR per USD and inflation data provided by the OECD.

For instance, the UK authorities do not offer compensation for time spent in PTD on acquittal, but ‘the Secretary of State shall pay compensation for the miscarriage of justice’ in case a person has been convicted of a criminal offence and the conviction has been reversed or the person has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.³⁴³ In France, an acquitted person has the right to be compensated to the level of their material losses;³⁴⁴ in Germany, detainees are compensated for both moral and material losses;³⁴⁵ and in the Czech Republic, for lost wage, moral damage and other trial-related expenses, such as the cost of legal counsel, expert opinions or travel.³⁴⁶

The daily compensation rates differ case by case as well as across countries. Unfortunately, the average rates are unavailable for most Member States and we must therefore extrapolate from the existing data. In the Czech Republic, detainees are compensated CZK 170 (approximately €6.50) per day for loss of earnings and may be further compensated between CZK 500 and CZK 1,500 per day (€19–€57) for moral damage (Law4U, 2017). In Germany, defendants who are eventually acquitted are entitled for compensation of €25 per day;³⁴⁷ in Austria, the compensation is based on personal conditions and varies between €20 and €50 per day;³⁴⁸ in France, the average daily compensation for moral damage depends on the length of PTD and is at €73 on average (France Commission de suivi de la détention provisoire) in the Netherlands, average compensation is €80–€105, depending on whether the person was held on remand or in a police cell;³⁴⁹ and in Finland, the average compensation is at around \$100 (€89) (Turun Sanomat, 2015). Given this wide range of estimates, we assume a conservative average compensation of €35 per day, which is adjusted for each country according to the relative purchasing power price indexes for countries, provided by the OECD. (OECD, 2017) The resulting average daily compensation rates can be found in Table 16. Note that particularly for high-income countries, this value may be substantially lower than the actual amount, which is in line with our conservative approach to the cost modelling.

Note that, in the absence of concrete data we assume that all acquitted pretrial detainees are eligible for compensation.³⁵⁰ In addition, direct data on the extent to how many individuals in pretrial are subsequently acquitted is not available. Instead, we proxy this by the relative share of individuals acquitted compared to the number those convicted obtained from Eurostat,³⁵¹ with missing values set to the average of those observed. The average daily compensation cost per detainee are reported in Table D5.

³⁴³ Section 133 of the Criminal Justice Act 1988.

³⁴⁴ Articles 149 and following of the Code of Criminal Procedure.

³⁴⁵ Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen from 8 March 1971 (BGBl. I S. 157).

³⁴⁶ Act 82/1998 Sb.

³⁴⁷ Section 7 para. 3 German Code of Compensation for Measures of Prosecution.

³⁴⁸ §14 of Ersatz von Schäden aufgrund einer strafgerichtlichen Anhaltung oder Verurteilung (Strafrechtliches Entschädigungsgesetz 2005 – StEG 2005).

³⁴⁹ Article 89 of the Code of Criminal Procedure.

³⁵⁰ This may not be entirely true in practice as, for example, the full compensation as outlined above may be dependent on proving mental damage in some countries.

³⁵¹ Persons brought before criminal courts by legal status of the court process [crim_crt_per].

■ Table D5: Cost of compensation

	Average daily compensation	Estimated probability of being acquitted	Average cost per day
Austria	€35.35	24.4%	€8.63
Belgium	€35.35	9.1%	€3.22
Bulgaria	€16.63	2.9%	€0.48
Croatia	€22.23	17.3%	€3.84
Cyprus	€35.00	9.1%	€3.19
Czech Republic	€20.65	6.2%	€1.28
Denmark	€42.70	12.5%	€5.34
Estonia	€23.45	1.1%	€0.26
Finland	€89.00	1.6%	€1.42
France	€73.00	3.5%	€2.56
Germany	€25.00	9.1%	€2.28
Greece	€26.95	9.1%	€2.45
Hungary	€18.20	3.5%	€0.64
Ireland	€35.00	13.7%	€4.80
Italy	€32.20	9.1%	€2.93
Latvia	€21.70	1.0%	€0.22
Lithuania	€21.56	4.0%	€0.86
Luxembourg	€37.80	9.1%	€3.44
Malta	€28.70	9.1%	€2.61
Netherlands	€35.35	11.4%	€4.03
Poland	€17.50	9.1%	€1.59
Portugal	€25.90	22.4%	€5.80
Romania	€17.50	2.0%	€0.35
Slovakia	€21.00	5.0%	€1.05
Slovenia	€25.55	3.9%	€1.00
Spain	€29.40	16.7%	€4.91
Sweden	€41.65	9.1%	€3.79
United Kingdom	€37.10	19.1%	€7.09

Sources: Eurostat [crim_crt_per]

- Summary of the quantified impacts at individual and public level.

Table D6 brings all the previous steps together and summarises all the quantified impacts as costs per day per detainee to be in detention pretrial. Note that there is variation across different Member States, but the average across all countries is that having an individual in PTD costs on average about €115 to €123 depending on whether the average is weighted by population size or not. Note that this estimate is likely underestimating the true scale of the cost as many other impacts have not been quantified due to restrictions in data availability.

■ Table D6: Quantified impacts of PTD at individual and public level

Member State	Cost to public PTD/day	Net earnings loss/day	Property loss/day	Cost to compensation/day	Total cost/day
Austria	€ 113.0	€ 17.3	€ 1.3	€ 8.6	€ 140.3
Belgium	€ 137.3	€ 18.0	€ 1.1	€ 3.2	€ 159.7
Bulgaria	€ 60.9	€ 2.1	€ 0.5	€ 0.5	€ 64.0
Croatia	€ 7.3	€ 4.9	€ 0.6	€ 3.8	€ 16.6
Cyprus	€ 28.2	€ 14.5	€ 0.5	€ 3.2	€ 46.4
Czech Republic	€ 45.0	€ 5.0	€ 0.6	€ 1.3	€ 51.9
Denmark	€ 191.0	€ 18.1	€ 1.7	€ 5.3	€ 216.1
Estonia	€ 39.4	€ 5.4	€ 0.5	€ 0.3	€ 45.5
Finland	€ 175.0	€ 18.2	€ 1.0	€ 1.4	€ 195.6
France	€ 90.3	€ 15.7	€ 0.8	€ 2.6	€ 109.4
Germany	€ 129.4	€ 16.6	€ 0.8	€ 2.3	€ 149.0
Greece	€ 28.2	€ 9.0	€ 0.2	€ 2.5	€ 39.9
Hungary	€ 26.6	€ 3.3	€ 0.3	€ 0.6	€ 30.8
Ireland	€ 189.0	€ 17.2	€ 1.1	€ 4.8	€ 212.1
Italy	€ 141.8	€ 13.1	€ 0.5	€ 2.9	€ 158.3
Latvia	€ 22.6	€ 3.7	€ 0.2	€ 0.2	€ 26.8
Lithuania	€ 18.3	€ 3.5	€ 0.6	€ 0.9	€ 23.2
Luxembourg	€ 206.5	€ 23.8	€ 0.4	€ 3.4	€ 234.1
Malta	€ 28.2	€ 9.7	€ 0.5	€ 2.6	€ 41.0
Netherlands	€ 253.0	€ 20.8	€ 0.4	€ 4.0	€ 278.2
Poland	€ 22.5	€ 4.1	€ 0.5	€ 1.6	€ 28.7
Portugal	€ 41.2	€ 8.1	€ 0.5	€ 5.8	€ 55.7
Romania	€ 19.8	€ 2.5	€ 0.5	€ 0.4	€ 23.2
Slovakia	€ 39.4	€ 4.6	€ 0.4	€ 1.1	€ 45.5
Slovenia	€ 60.0	€ 7.2	€ 0.5	€ 1.0	€ 68.8
Spain	€ 59.7	€ 12.1	€ 0.5	€ 4.9	€ 77.2
Sweden	€ 404.0	€ 18.9	€ 1.7	€ 3.8	€ 428.3
United Kingdom	€ 125.0	€ 19.6	€ 2.1	€ 7.1	€ 153.8
EU average	€ 99.8	€ 11.6	€ 0.7	€ 2.8	€ 115.0
EU average (weighted)	€ 105.8	€ 13.4	€ 0.9	€ 3.3	€ 123.4

Note: The weighted average is weighted using relative population sizes of each member state.

Appendix E: Qualitative assessment of the impact of poor detention standards

The table below sets out the findings from a search of the existing literature on relevant ECtHR jurisprudence, and a search of the HUDOC database which provides access to the case-law of the ECtHR to identify cases which referred to the EPRs.³⁵²

Each row is an aspect of detention conditions covered in the European Prison Rules. The table starts with a set of overarching principles expressed in the EPR, followed by the individual categories of various aspects pertaining to detention conditions. Given the pre-eminence of material detention conditions, the overarching category of “conditions of improvement” is broken down to individual subcategories to allow for greater granularity of analysis. The second column reflects whether the research team has identified an ECtHR finding of an ECHR violation based for the EPR category in question. The last column provides examples of concrete causes of any violations along with corresponding cases.

As the table demonstrates, relevant ECtHR judgments were identified in approximately half of EPR sections.

■ **Table E1: Overview of ECtHR-based impact assessments**

Type of gap (by EPR section)	Impact assessment	Examples of specific issues
Basic principles		
Retention of all rights not lawfully taken away by court decision	De facto violation	Voting rights (<i>Hirst v the UK</i>); right to artificial insemination (<i>Dickson and others v the UK</i>)
Necessary minimum and proportionality of restrictions	De facto violation	Solitary confinement of mentally ill (<i>Renolde v. France</i>)
Facilitation of social rehabilitation	De facto violation	Rehabilitation of long-term prisoners (<i>Vinter and others v. the UK</i>)
Conditions of imprisonment		
Admission of prisoners	No de facto violation identified yet	
Allocation and accommodation	De facto violation	Premises not adapted to prisoner’s disability (<i>Helhal v. France</i>); overcrowding and lack of personal space, privacy, ventilation, lighting (<i>Torregiani and Others v. Italy</i>); dilapidation and disrepair of detention facility (<i>Canali v. France</i>)
Hygiene	De facto violation	Unsanitary and/or unhygienic conditions (<i>Peers v. Greece 2001</i>)

³⁵² The search of the database was done using a combination of search terms involving “European Prison Rules” and individual categories of detention conditions, e.g. “hygiene” or “nutrition.”

Clothing and bedding	De facto violation in combination with other factors ³⁵³	
Nutrition	De facto violation	Insufficient diet (<i>Moisejevs v. Latvia</i>)
Legal advice	De facto violation	Inadequate supplies and interference with legal correspondence (<i>Cotlet v Romania 1997</i>); lack of confidentiality in legal communication (<i>Rybacki v. Poland</i>)
Contact with the outside world	De facto violation	Prohibition of leave to attend a funeral of a relative where there is no risk of absconding (<i>Ploski v Poland</i>); denial of the right to vote (<i>Hirst vs UK No. 2</i>); limits on visits (<i>Piechowicz v. Poland</i>)
Prison regime (activities, welfare needs)	De facto violation in combination with other factors	Activities and time spent outside of cell one of the factors considered in the context of overcrowding and minimum space requirements (<i>Mursic v Croatia</i>) ³⁵⁴
Work	No de facto violation identified yet	
Exercise and recreation	De facto violation in combination with other factors	Activities and time spent outside of cell one of the factors considered in the context of overcrowding and minimum space requirements (<i>Mursic v Croatia</i>)
Education	No de facto violation identified yet	Availability of education activities one of the factors considered in the context of overcrowding and minimum space requirements (<i>Mursic v Croatia</i>)
Freedom of thought, conscience and religion	No de facto violation identified yet	
Information (e.g. prison regulations)	No de facto violation identified yet	
Prisoners' property	De facto violation	Obligation to partially place earnings into a deposit fund (<i>Siemaszko and Olszyński v.</i>

³⁵³ A case involving the use of overalls by prisoners held in isolation ended in an EctHR finding of the right to private life (Article 8) but the use of overalls in general was found not to have resulted in an Article 3 violation (*Lindström and Mässeli v Finland*).

³⁵⁴ In *Mursic v Croatia*, the Court found a violation of Article 3 on the grounds of a continuous period when the applicant was held in less than 3sq metres of personal space. Other non-consecutive periods of detention with personal space of less than 3sq metres and all detention periods with personal space of mre than 3 but less than 4 sq metres were not found to give rise to a violation of Article 3. A contributing factor to this decision was the availability of activities (recreational, educational, work) and freedom of movement outside the cell.

		Poland)
Transfer of prisoners ³⁵⁵	De facto violation in combination with other factors	Repeated transfers (Bamouhammad v. Belgium)
Release of prisoners	No de facto violation identified yet	
Women (special provisions addressing the needs of female inmates)	No de facto violation identified yet	
Detained children (special provisions addressing the situation of inmates under 18 years of age)	De facto violation	Lengthy detention in a stressful and coercive environment (A.B. and Others v. France)
Infants (provisions for infants staying in prison with parents)	De facto violation	Inadequate medical care for a newborn/young child (Korneykova and Korneykov v. Ukraine)
Foreign nationals	No de facto violation identified yet	
Ethnic and linguistic minorities	No de facto violation identified yet	
Other aspects of detention conditions		
Health care	De facto violation	Physical health assistance (Mouisel v. France, Serifis v. Greece)
Good order (e.g. safety, use of force)	De facto violation	Insufficient protections of prisoner's safety (e.g. lack of safety assessments, Edwards v. UK, D.F. v. Latvia; prison regime and application of security measures (e.g. strip searches) (van der Ven v. the Netherlands, Tali v. Estonia, El Shennawy v. France), ability to lodge complaints without fear of reprisal (Shahanov and Palfreman v. Bulgaria)
Management and staff (e.g. staff selection, training, specialist staff)	De facto violation	Treatment of prisoners during staff training (Davydov and others v Ukraine)
Inspection and monitoring	No de facto violation identified yet	However, there have been judgments for failure to investigate individual incidents (e.g. Karabet and Others v. Ukraine)
Specific conditions for untried prisoners and for sentenced prisoners, respectively	De facto violation	Failure to presume innocence, e.g. in treatment by prison guards (Iwanczuk v. Poland)

³⁵⁵ The EPR category covers moves in/to prison and between prisons. It is not related to transfers of persons under mutual recognition instruments.

Source: Analysis by the research team.

Appendix F: Associations between prison overcrowding and prison suicides

■ Table F1 Prison density across 28 EU Member States in 2015

Member State	Prison density
Austria	1.0327
Belgium	1.2704
Bulgaria	0.7365
Croatia	0.8307
Cyprus	0.9732
Czech Republic	1.0040
Denmark	0.8516
Estonia	0.8332
Finland	0.9947
France	1.1338
Germany	0.8468
Greece	0.9757
Hungary	1.2939
Ireland	0.8962
Italy	1.0557
Latvia	0.7517
Lithuania	0.8535
Luxembourg	0.9381
Malta	-
Netherlands	0.7690
Poland	0.8105
Portugal	1.1295
Romania	1.0126
Slovak Republic	0.9019
Slovenia	1.0582
Spain	0.8230
Sweden	0.9091
United Kingdom	0.9734

Note: Based on SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Survey 2015. Note that a measure higher than 0.90 is regarded as risk of overcrowding according to the CoE. A value larger than 1 is a sign of prison overcrowding.

Unfortunately, for most of the impacts described above, data is not available in order to quantify the impacts of poor detention conditions. The CoE and the UNODC have data on suicides in prisons that is used as a proxy outcome for adverse individual outcomes of prison overcrowding. It is important to mention that suicides among prison population not necessarily are solely driven by a lack of adequate detention conditions, but existing evidence suggests that prison overcrowding is associated with suicides and deaths in prisons, as well as increased rates of violence and self-harm (Penal Reform International, 2017).

Table F2 reports the estimated associations between prison density as measure for prison overcrowding and related adverse outcomes, such as prison suicides and prison deaths, the regression specifications control for the staff ratio in prisons, the proportion of pretrial population, the

proportion of prisoners sentenced with drug-related offences, the proportion of prisoners sentenced for violent crimes and also the proportion of foreign prisoners. In order to take into account that prison density is measured differently across countries, we include country fixed effects that should capture that effect if the reporting has not changed dramatically over the last couple of years within a country. The regression specifications also adjust for year-fixed effects in order to capture any time trends in prison density and suicide and death rates that are common across EU Member States. Column (1) reports that a larger prison density is associated with more prison suicides across the 28 Member States. The proportion of prisoners sentenced with violent crime offenses is associated with higher suicides as well as the proportion of foreign inmates.

■ **Table F2. Associations between prison density and prisoner suicides and deaths in 28 Member States**

	(1)			(2)		
	Suicides			Deaths		
	Coef.	Std. Err.	z	Coef.	Std. Err.	Z
Prison density	0.3619	0.1902	1.9	0.2184	0.1828	1.19
Staff ratio	0.0556	0.0700	0.79	0.0655	0.0782	0.84
Population country	0.0000	0.0000	0.11	0.0001	0.0000	0.79
GDP per capita	0.0000	0.0000	-1.3	0.0001	0.0000	2.74
Proportion pretrial	-0.1413	0.3485	-0.41	-0.6823	0.2799	-2.44
Proportion drug offenses	-0.2021	0.1792	-1.13	-0.1943	0.1412	-1.38
Proportion violent crime	0.4248	0.2491	1.65	0.0224	0.2353	0.10
Proportion foreign inmates	0.1214	0.0431	2.82	0.4786	0.5253	0.91

Note: Based on SPACE I – Council of Europe Annual Penal Statistics: Prison populations. Surveys 2002-2015. Estimated coefficients are based on a negative binomial regression model. A z-value larger than |1.65| means the estimated coefficient is statistically different from zero at the 10 per cent significance level. The regression specifications include country-fixed effects to account for differences in reporting of prison density measures across country and time effects in order to account for time trends common across countries.

Appendix G: Topic guide for interviews

Interviewees were sent the following information in the form of a briefing note in advance of the interview.

The Cost of Non-Europe: Procedural Rights and Detention Conditions

TOPICS FOR DISCUSSION DURING THE INTERVIEW

Below we list topics and questions we would like to raise with you. However, we understand that you might not feel able to comment on all of these issues and that you may have more knowledge on some than others.

The competence of the EU in relation to procedural rights

Article 82(2)(b) of the Treaty is key to the competence of the EU to act in relation to procedural rights. The CJEU has not yet provided an interpretation of the article's scope and there has been some discussion about the significance of the reference to a 'cross-border dimension'.

In the context of adoption of the Directive on the right to information in criminal proceedings, the European Council explicitly stated that the broad scope (i.e. extending beyond the 'cross-border' limitations foreseen in Article 82.2b TFEU) should not be interpreted as constituting a precedent for future work. Therefore, the question whether the EU has competence in areas extending beyond matters with a cross-border dimension is not universally considered a settled one. Put differently, it should not be ruled out that future EU legislative measures relating to procedural rights might be challenged as going beyond the competence conferred in the Treaties. Still, while acknowledging the historical debate on EU competence in this area, it seems to use that the debate is generally seen as being settled in favour of a more expansive view of EU competence.

Is the summary in the paragraph above broadly accurate?

Are there other arguments relating to competence we should make note of in our report?

The competence of the EU in relation to pretrial detention rights and conditions

Article 82(2)(b) TFEU grants the EU the power to adopt minimum rules to protect the rights of the individual in criminal proceedings, including the right not to be subjected to torture or to inhuman or degrading treatment or punishment (Article 3 ECHR). This could be interpreted to apply to the conditions of pretrial detention (as pretrial matters all fall within the scope of 'criminal procedure'). This view of Article 82(2)(b) TFEU seems to be shared by Member States, the majority of which did not raise any objections to EU

lawmaking in this area on competence grounds in their response to the Commission's 2011 Green Paper on detention.³⁵⁶

Is this analysis correct? Are there further relevant points we should note in our report relating to competence in relation to pretrial detention?

The competence of the EU in relation to post-trial detention conditions

Article 82(2)(b) TFEU specifically refers to the rights of individuals in criminal proceedings. It not clear whether this phrase should be interpreted restrictively so as to leave post-trial detention conditions out of the scope of the article. However, the EP is of the view that Commission should develop and implement minimum standards for prison and detention conditions based on Art 82(2)(b). Also, the decision in *Aranyosi and Căldăraru*, which did not differentiate between pre- and post-conviction detention conditions, indicates that EU legislation in relation to post-trial conditions could be permitted to facilitate mutual recognition.³⁵⁷

Is this analysis correct? What further arguments should we make note of in our report?

What is your view on the relevance of Article 7 as a basis for EU action?

Coherence of the six procedural rights Directives

The cornerstone of EU legislation in the domain of procedural rights is a set of measures adopted in response to the 2009 Roadmap on procedural rights:

- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.
- Directive 2012/13/EU on the right to information in criminal proceedings.
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.
- Directive 2016/343/EU on the presumption of innocence and the right to be present at trial in criminal proceedings.
- Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings.
- Directive 2016/1919/EU and Commission Recommendation on legal aid for suspects or accused persons in criminal proceedings.

³⁵⁶ Only two MS (DK, PL) expressed concerns about the competence of the EU, invoking the principle of subsidiarity. This opinion was also shared by one responding association – the German Association of Judges.(EC, 2011a).

³⁵⁷ Irrespective of the debate on EU's legislative competencies, we note that Article 7 TEU provides the legal basis for the EU to react to poor detention conditions insofar as these constitute a failure to uphold the values contained in Article 2 TEU.

Given the decision to legislate on each of these measures separately, to what extent is there coherence/lack of duplication between these Directives? Is there any argument/appetite to consolidate these different measures in a single instrument?

Our research indicates that there are gaps in the way in which these Directives are being implemented which *could* undermine the intended protection of rights. These include technical difficulties (e.g. inconsistent transposition) and interpretation issues (to be addressed by jurisprudence). Our review of the evidence indicates that gaps in the protection of procedural rights in practice tend to stem from elements not prescribed by the Directives. Examples include the *quality* of legal aid or translation, the *approach to assessment* of whether a suspect needs translation or whether the suspect can understand proceedings etc.

Do you agree with this assessment?

To what extent do you think the six Directives have led to greater protections for suspects and accused persons? How could the impact and effectiveness of these measures be improved?

Gaps: procedural rights not protected by EU measures

The EU Roadmap and ensuing directives cover only a subset of relevant procedural rights, although further protection is afforded by other instruments, notably the ECHR and ECtHR case law. Our research to date highlights procedural rights currently not protected by EU law – examples include: witnesses’ rights and confiscatory bans; admissibility and exclusion of evidence and other evidentiary issues; conflicts of jurisdiction and *ne bis in idem*; remedies and appeals; and the right to cross-examine witnesses.³⁵⁸ There might also be procedural rights that arise particularly in relation to the use of mutual recognition instruments.

Should any of the rights we mentioned in the paragraph above be prioritised for EU measures?

Are there other procedural rights you think should be protected by EU measures? If so, what rights, and why?

To what extent do you think the priority should be to consolidate and implement existing EU measures relating to procedural rights, or should the focus be on protecting new rights?

Gaps: monitoring of procedural rights

An important aim of our study is to understand where there is scope for EU action that could add value. In relation to procedural rights, there is limited reliable empirical data about the *extent to which procedural rights are protected in practice* (beyond anecdotal evidence). There is relatively little evidence about the *causes* of lack of respect for procedural rights (e.g. lack of legislative protection, judicial culture and practices, etc.). Additionally, there is little or no evidence about the *impact* of lack of respect for rights (for individuals and more broadly on criminal justice systems and society). This makes it

³⁵⁸ Some of these are explicitly protected in the ECHR; others are taken from Matt, 2017.

difficult to understand the scale of the problem, and, if there is a problem, whether additional EU action or cooperation could improve the situation.

In your opinion, what is the extent to which procedural rights are not respected in the EU? Which are the rights most often infringed?

Where procedural rights are not protected, what are the causes (i.e. lack of legal protection/law, judges/prosecutors not exercising oversight, defence lawyers' limitations)?

What do you consider to be the main monitoring measures in relation to the respect for procedural rights? Are more mechanisms needed, and if so, who should undertake the monitoring?

To what extent do you think that better monitoring would contribute to improved procedural rights?

Potential for EU measures in the area of rights relating to the imposition of pretrial detention

There is extensive ECtHR case law on pretrial detention setting out the required preconditions and procedural rights. Research has found gaps in the extent to which pretrial detention rights are respected in practice across the EU, but it is difficult to gather systematic empirical evidence about the scale of non-respect for these rights and the impact this has on outcomes for individuals. The EP has called for EU measures to harmonise pretrial detention conditions and the circumstances in which pretrial detention can be imposed.

What are your views on whether there should be EU measures on pretrial detention standards (i.e. when and how pretrial detention should be imposed)? If you think there should be measures, should these be legislative?

To what extent do you think EU measures on the imposition of pretrial detention would add value in terms of contributing to protecting the rights of suspects and accused persons?

What are the main barriers to further EU action in this area? To what extent do you consider that it is feasible to implement EU measures in relation to the imposition of pretrial detention?

Gaps: variable standards in detention conditions (pre- and post-trial) between Member States

There is reliable empirical evidence that detention conditions regularly fall below Council of Europe standards and there have been calls for EU action in relation to detention conditions. There exist clear international standards (e.g. European Prison Rules) but these are of quasi-legal character (at best).

To what extent do you think that EU legislative measures aiming to harmonise detention conditions are needed to improve the conditions experienced by prisoners and/or to ensure the smooth functioning of mutual recognition? Would EU measures be effective in improving conditions?

What are the barriers to the full implementation of adequate standards in detention conditions? What are the most serious causes of inadequate detention conditions? What are the biggest gaps in existing legislation and standards?

Gaps: monitoring and enforcement in relation to detention conditions

There are several limitations to existing enforcement mechanisms in relation to detention conditions. A range of EU, CoE and UN monitoring mechanisms exist, although these vary substantially in their scope and rigour. Definitions vary across Member States and may affect the quality and comparability of collected data. In light of *Aranyosi*, questions left unanswered are how, what, and by whom data should be collected in order to execute mutual recognition instruments.

Do you agree with the assessment in the paragraph above?

To what extent do you think that better monitoring would contribute to improved detention conditions? What kinds of monitoring and enforcement do you consider would be most effective?

Options for EU action

Based on research so far, the box below lists various possible options for further European action and cooperation in relation to procedural rights and detention conditions.

We do not expect you to comment on each of the options below, but we invite you to reflect on the following in relation to possible policy options that you consider particularly relevant:

- a. **In your opinion, what are the potential options for action at the EU level that could address the identified gaps and barriers outlined above in relation to procedural rights and detention conditions?**
- b. **To what extent would the policy options be likely to address the identified gaps? What factors contribute/limit the potential impact of options for further EU action and cooperation?**
- c. **To what extent is additional EU action/cooperation politically feasible? What is the legal basis?**
- d. **What unintended consequences could the option lead to?**

Possible policy measures (please note that this list is preliminary and includes a longlist of the different ideas and options we have encountered in our fieldwork so far)

<p>Soft measures</p> <ul style="list-style-type: none">Commission coordinate exchanging best practices, create working groups, exchange programmes, and training for judges and other practitioners.Commission support academic studies and research (e.g. into what alternatives to detention exist and into their effectiveness).Support Member States in implementing EU law, including: 1) developing practical guidance in relevant areas (e.g. how to assess need for interpretation and translation); 2) introducing specific lists of essential documents and provide guidance on how to apply any exceptions; and 3) introducing specific safeguards to ensure that the confidentiality of communication between suspected or accused persons and their legal counsel is strictly respected.Unify relevant definitions in the EU (e.g. pretrial detention).
<p>Legislative changes</p> <p>Procedural rights</p> <ul style="list-style-type: none">Introduce new EU legislation (e.g. a <i>prima facie</i> right to pretrial release, second Roadmap on procedural rights).Amend existing EU legislation, for example: 1) mandate CJ authorities develop clear and binding rules on securing legal interpreters or translators; 2) mandate MS ensure information is delivered in non-technical and accessible language, including the written Letter of Rights; and 3) mandate MS introduce practical arrangements to facilitate access to case materials. <p>Detention conditions</p> <ul style="list-style-type: none">Make European Prison Rules binding (e.g. European Prison Compact).Require all MS to define minimum space requirements.Monitoring.Increase funding to monitoring bodies, e.g. National Preventative Mechanisms.Improve coordination across EU/UN/CoE, e.g. in coordinating data collection to avoid duplication of effort.Mandate the FRA to establish a European Fundamental Rights Information System (EFRIS). <p>Enforcement</p> <ul style="list-style-type: none">Greater use of procedures under Article 46 of the Convention by the Committee of Ministers.Council of Europe CM Action under Article 7 and 8 of the Statute.EU help with enforcing Council of Europe/UN recommendations.Create an EU Mechanism (Pact) on democracy, the rule of law and fundamental rights consisting of a) annual report and policy cycle.Better use of infringement procedures - use systemic infringement procedure (Article 258 TFEU) by the Commission or increased use of Article 259 TFEU by Member States (bringing other Member States to the CJEU). <p>Institutional measures</p> <ul style="list-style-type: none">Strengthen the European Commission rule of law framework (e.g. clarify scope, provide benchmarks)Improve the Council's Rule of Law DialogueCreate a new inter-parliamentary dialogue hosted by EPProceed with EU accession to the ECHR.

This study identifies the impact of the gaps and barriers in EU cooperation and action in the area of procedural rights and detention conditions and examines the potential benefits of more concerted action at EU level compared to lack of action, or action by Member States alone.

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