



INSIGHT

THE INTERPLAY BETWEEN THE EUROPEAN SUPERVISION ORDER AND THE EUROPEAN ARREST WARRANT: AN UNTAPPED POTENTIAL WAITING TO BE HARVESTED

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ABSTRACT: This *Insight* will discuss the European Supervision Order (ESO) in the context of its nexus with the EAW. It will give an overview of the ESO, focussing on the issue of the ways in which breaches of an ESO may be addressed. The argument is advanced that the ESO's potential is currently untapped and that it has the ability to make the EAW procedure function more efficiently. This is done through a survey of Irish EAW case-law where the ESO could have been engaged. Finally, it will make suggestions for reform.

KEYWORDS: European Supervision Order – European Arrest Warrant – bail – European Investigation Order – pre-trial detention – mutual recognition.

I. INTRODUCTION

An EU criminal justice system has been steadily growing since Tampere,¹ based on the principle of mutual recognition, which inextricably involves mutual trust of all Member States legal systems, regardless of their differing legal culture. Common to all EU legal cultures is some system for apprehending a suspect, conducting an investigation for the offence, making a decision as to whether to charge and send the suspect forward for trial, and finally, putting the accused on trial. Between arrest and trial, there will always be some procedure for either keeping the suspect/accused in custody, or releasing them, with or without conditions. For cross border offences,² the EU criminal justice

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¹ European Council, Presidency conclusions of 15-16 October 1999.

² Note however that not all the other instruments in the EU criminal justice toolbox require a cross border element e.g. the procedural rights instruments: Directive of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48 of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence.



system has a toolbox of instruments to deal with each of these pre-trial aspects: the European Arrest Warrant (EAW) for apprehending a suspect;³ the European Investigation Order (EIO)⁴ for gathering the necessary evidence required for prosecution of the offence and the European Supervision Order (ESO)⁵ to address the intervening period between arrest and trial. The EAW, in force since 2003 is clearly used to a very large extent, The EIO is the most recent, having been in force since 2017 and evidence suggests it too is being used frequently.⁶ The ESO on the other hand, which came into force in 2012 has hardly been used at all.⁷ Moreover, its implementation was slow, indeed it is only since the Commission gained jurisdiction to bring infringement proceedings that implementation accelerated. Ireland, following such proceedings, is only now on the cusp of implementing the Framework Decision.⁸

The ESO was designed against a backdrop where the emerging consensus in EU was that detention should be used as a last resort both at pre-trial and conviction stages, and that alternative sanctions should be used, with rehabilitation at the centre.⁹ It was also driven by increasing evidence of prison overcrowding and poor conditions. Some of that prison overcrowding could be relieved if non-national suspects, often held in pre-trial detention in situations where nationals would have been granted a conditional release, could be likewise released to be supervised in their own country of residence while awaiting trial. It was primarily with that class of persons in mind that the ESO was designed, not those persons surrendered under an EAW.¹⁰

³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁴ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

⁵ 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.

⁶ European Investigation Orders and European Supervision Order, ECLA UK Seminar IALS, 4 December 2018.

⁷ The most recent iteration of this: "Several Member States pointed out that the ninth round of mutual evaluations on Framework Decisions on probation and alternative sanctions (2008/947/JHA) and on European supervision order (2009/829/JHA), to be carried out in 2019-2020, is likely to provide valuable information on the scarce use of these EU's mutual recognition instruments". Council Presidency Report of 19 December 2019, *Alternative measures to detention*. At the time (2014) of the 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, 17 Member States had not notified the Commission of their implementation.

⁸ Irish Criminal Justice Bill no. 63 of 2019 (Mutual Recognition of Decisions on Supervision Measures).

⁹ Council of Europe Recommendation Rec (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Appendix to Recommendation Rec (2006)13.

¹⁰ I have come to this conclusion based on my analysis of the preparatory documents to the original Proposal, see: Communication SEC(2004)1046 from the Commission of 17 August 2004, Annex to the

This *Insight* will discuss the ESO in the context of its nexus with the EAW. It will first give an overview of the ESO, focussing on the issue of the ways in which breaches of an ESO may be addressed. The argument is advanced that the ESO's potential is currently untapped and that it has the ability to make the EAW procedure function more efficiently. This is done through a survey of Irish EAW case-law where the ESO could have been engaged. Finally, it will make suggestions for reform.

II. FRAMEWORK DECISION ON THE EUROPEAN SUPERVISION ORDER

The Framework Decision on the ESO (FD ESO) addresses the problem facing persons who find themselves on the wrong side of the law while visiting another Member State. Non-resident accused persons are generally regarded as a flight risk, and are therefore less likely to obtain bail than a resident national had they committed the offence in the same jurisdiction. It is also the case that some Member States tend to have long periods of pre-trial detention, in some cases, up to four years. The prospect of an unnecessary or lengthy pre-trial detention also raises difficulties for the operation of the EAW since it does not foster mutual trust. To rectify this situation, the ESO was developed to encourage EU Member States to impose pre-trial supervision measures on a non-resident accused person that could be executed in the person's home State, so as to avoid imposing unnecessary custodial detention and differential treatment of residents and non-residents.¹¹

The ESO is a relatively simple instrument. Its stated dual aim is protecting the general public and their right to live in safety and security by not releasing persons without supervision, while at the same time safeguarding the right to liberty of accused persons by providing alternative measures to custodial detention, especially where the principal reason for detaining them pre-trial is the fact that they are non-residents and therefore a presumed flight risk.

The ESO must have its genesis in a domestic decision, so there must have been a successful application for release from pre-trial detention, or as known in the common law, a successful application for bail, and one that has conditions attached (therefore

Green Paper on mutual recognition of non-custodial pre-trial supervision measures COM(2004)562 final; Commission Staff Working Document SEC/2006/1079 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.

¹¹ The ESO received its original impetus from the Programme of measures to implement the principle of mutual recognition as Measure 10: "On the basis of the above catalogue, consider the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court's decision to be recognised and immediately enforced. This instrument should apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State and should specify how such measures would be supervised and the penalties applicable in the event of non-compliance with them".

supervision is required). That application should proceed bearing in mind the detention as a last resort principle.

The ESO enables the non-custodial supervision measure to be transferred from the Member State where the non-resident is suspected of having committed an offence to the Member State where he is normally resident. This allows a suspect to await their trial under supervision in their own resident state, including suspects who have been surrendered following an EAW. It may only be imposed where the suspect consents to return to the State of normal residence, or to a third State.¹² The executing state may refuse recognition on a number of grounds including absence of consent by the person concerned, incompletely filled out forms, recognition would breach *ne bis in idem*.

Its simplicity however, begins to fade where it comes to a breach of the ESO. In the development of the instrument, it was always considered essential that there should be some method of return in the event of breach. From the outset, the ESO was intended as an instrument that should cover all types of offences. This raised a difficulty of using it in conjunction with the EAW in the event of a breach of the ESO, which applies to serious offences. For offences not requiring double criminality, the threshold is a minimum sentence of three years, (Art. 2, para. 2, FD EAW) and for offences falling outside the list, a 12 month minimum applies (Art. 2, para. 1, FD EAW) The FD ESO overcomes this difficulty by providing in a recital that all provisions of the FD EAW should apply except for Art. 2, para. 1. Art. 21 FD ESO, dealing with surrender of the person, provides that Art. 2, para. 1, of the FD EAW may not be invoked as a ground for refusal to execute. Nonetheless, Art. 21, para. 3, gives Member States the option to avoid this provision by notification to the general Secretariat of the Council that it will also apply Art. 2, para. 1, FD EAW in deciding whether to surrender the person to the issuing state. It also includes a ground for non-recognition in Art. 15, let. h), where the executing State "in case of breach of the supervision measures" would have to refuse to surrender the person through an EAW. Where the latter arises, the requested Member State may still carry out the supervision measures on the understanding that in case of breach the person will not be surrendered, if the issuing State is happy to proceed notwithstanding the caveat for recognition.¹³

Where a "serious breach" of the supervision measures arises, the authorities in both issuing and executing states are obliged to consult each other,¹⁴ but the jurisdiction rests with the issuing state to "take all subsequent decisions relating to a decision on supervision measures, including ordering a provisional detention. Such provisional detention might, in particular, be ordered following a breach of the supervision

¹² Art. 9 FD.

¹³ Art. 15, para. 3, FD ESO.

¹⁴ Art. 22 FD ESO.

measures or a failure to comply with a summons to attend any hearing or trial in the course of criminal proceedings".¹⁵

Recital 9 FD ESO clearly envisages provisional detention in situations not just of failure to appear, but also for lesser breaches of the order. Such a situation arose in a recent EAW request to Ireland.

In *Prieto*,¹⁶ the surrender of a person was sought by UK; he had been previously charged in Scotland with offences of assault and released on bail on conditions that he appear at the court when required and that he should report weekly to police station. He did not appear in court and the EAW was issued for a number of offences, the substantive offence of assault causing harm and the remainder relating to the breaches of his bail conditions. Since the remainder offences fell outside the Art. 2, para. 2, FD EAW list, the court had to establish correspondence.

Two questions arose in the case: "(a) whether the failure to attend court corresponds either with an offence contrary to section 13 of the Criminal Justice Act, 1984¹⁷ or, with the offence of criminal contempt of court and (b) whether the failure to sign on at the police station corresponds with a criminal contempt of court in this jurisdiction?"

In relation to (b), the High Court found that failure to report to a police station could not correspond with criminal contempt of court, as it did not amount to contempt in the face of the court, nor interference with administration of justice.

In relation to (a), the High Court considered that there was no correspondence with the 1984 Act because section 13 speaks of a "recognisance", which has always been interpreted as including a monetary debt. Here, the requested person however was not required to enter any condition of paying a monetary sum.¹⁸ The High Court did find correspondence between the Scottish failure to appear offence with common law criminal contempt in Ireland. While the surrender was ordered on the basis of the substantive offence (the assault) and the failure to appear charge, the High Court certified a point of law to the Court of Appeal. The certified question was: "Does the offence of failure to turn up in court in accordance with terms of conditional release correspond to any offence in this jurisdiction in particular to criminal contempt of court?"

As regards criminal contempt of court, Peart J. answered the question thus:

¹⁵ Recital 9; this would appear to create a tension with Council of Europe: Rules on use of Remand in custody Rule 12: A breach of alternative measures may be subject to a sanction but shall not automatically justify subjecting someone to remand in custody. In such cases the replacement of alternative measures by remand in custody shall require specific motivation.

¹⁶ High Court of Ireland, *Minister for Justice and Equality v. Prieto* [2015] IEHC 807.

¹⁷ Section 13 subsection 1 of the Criminal Justice Act, 1984 provides: "If a person who has been released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence"; the penalty is a fine or twelve months, it therefore fits within Art. 2, para. 1, FD EAW threshold.

¹⁸ A recognisance is an acknowledgment of a debt conditioned upon the happening of a certain event".

“Given the decisions in this jurisdiction on criminal contempt and the nature of the behaviour and the circumstances in which contempt of court has been found to have been committed, [...] I am firmly of the view that the failure of a person to answer his bail by attending in court as required is not a common law offence of contempt of court in this State. In such circumstances I believe that the trial judge erred in finding correspondence by reference to that common law offence”.¹⁹

As regards the section 13 offence, he came to the opposite conclusion of the High Court: “The words in section 13 of the 1984 Act “in accordance with his recognisance” must be read as meaning “in accordance with his commitment to appear”. It seems to me that when one looks at all the facts and circumstances as appear from the warrant and the additional information, it is clear that there is correspondence for the purpose of section 5 of the Act of 2003”.²⁰

As it transpires, in transposing the FD ESO the majority of Member States have given notification that they will apply Art. 2, para. 1, FD EAW. Ireland’s position is still awaited, but it is evident from the current wording of the Bill that it will likewise give the notification.²¹

In Ireland, as demonstrated in *Prieto*, a failure to appear would amount to an offence meriting twelve months, therefore within the threshold of Art 2. para. 1, FD EAW, however a breach of a condition falling short of a section 13 breach would need to seek its correspondence within the Bail Act 1997. There, maximum sentence for a breach of condition is three months. If the issuing authority did order a provisional detention for breach of conditions, in the absence of an order relating to failure to appear, the Irish court would have to refuse the order, relying on the ground of refusal in Art. 15, let. h), FD ESO. A key point is this: if other Member States have similar levels of threshold for a breach of conditions as Ireland, given the number that have notified that they will apply Art. 2, para. 1, EAW, that may act as a strong disincentive on Member States to use the ESO mechanism in the pre-trial stage, and effectively means that the ESO is not functioning as it was intended, i.e. to cover all offences without reference to any sanction threshold.

III. IRISH EAW CASES WHERE A ESO COULD HAVE BEEN USEFULLY ENGAGED

A number of cases have resisted surrender on the basis of section 37, para. 1, let. c), (iii) (II) of the Irish EAW Act 2003, which states that a person shall not be surrendered if

¹⁹ *Minister for Justice and Equality v. Prieto*, cit., para. 32.

²⁰ *Ibid.*, para. 41.

²¹ As it currently stands, the Bill refers to a condition of issuing a supervision measure to be that a person is charged with an offence where penalty is twelve months or more. In addition, it includes under the heading “Grounds on which supervision decision may or may not be monitored in State: 29. (1) A supervision decision shall not be endorsed or executed in the State under this Act where [...] (d) the supervised person is not a person who is the subject of proceedings in the issuing State for an offence to which an European arrest warrant could relate”.

there are reasonable grounds for believing that “he or she would be tortured or subjected to other inhuman or degrading treatment”, effectively a restatement of Art. 3 ECHR. Other cases show resistance to surrender on the basis of section 21 of the 2003 Act: “(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state”.

A large number of requests for surrender have been refused on this ground, and this is very much connected with the different cultures of criminal prosecution across the EU. Others have resisted on grounds of the prospect of lengthy pre-trial detention between surrender and trial.

In *Kinsella*,²² surrender was resisted on the basis of Art. 3 ECHR. It was argued that the prison conditions in Greece were such as could breach the rights of the person who was sought for a prosecution for the offence of drug trafficking, based on poor prison conditions, inter-prisoner violence in Greece and the specific health issues affecting the person. In such a case where objection is based on Art. 3 ECHR, the Irish court has held, based on the case law of the ECtHR and the Court of Justice,²³ that it is “not necessary to establish that there is a probability of ill-treatment, rather a real risk is sufficient”.²⁴ The evidential burden is on the person to establish the risk; in addition to evidence of specific hardship to the person, the Court will generally have regard to expert opinions from practitioners in the relevant jurisdiction, as well as reports from Committee on Prevention of Torture (CPT) and relevant responses, Member State authorities and NGOs.²⁵ Here the opinion was given by a legal practitioner in Greece that the person would very likely be held in pre-trial detention for at least 12 to 18 months, in one of the two particular prisons that had been inspected by CPT which found conditions and healthcare facilities to be well below standard. A further worrying aspect of the case revealed that the practice of holding people in pre-trial detention in police detention centres and that “ill-treatment in police detention centres is endemic”. He suffered from melanoma, and his medical advice was to avoid exposure to sun, in addition to quarterly check-ups to monitor his condition. In addition to the melanoma, he also suffered considerably from injuries sustained in two separate traffic accidents. The Court found:

“Where conditions are so bad that they violate Article 3, the good intentions and bona fides of the appropriate authorities cannot excuse the breach. If the Court was to hold other-

²² High Court of Ireland, *Minister for Justice and Equality v. Kinsella* [2017] IEHC 519.

²³ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* [GC].

²⁴ Supreme Court of Ireland, *Minister for Justice, Equality v. Rettinger* [2010] IESC 45.

²⁵ *Ibid.* Another case found evidence alone from 1 NGO, Fair Trials International, without more was insufficient.

wise, the Court would be violating its duty to protect the fundamental rights of those people who appear before it.[...] The duty to be “forward looking” demands consideration of how the particular requested person will be treated in the issuing state, rather than simply focusing on how other people may have been treated in the past. Importantly however, the term “forward looking” does not mean and could not mean, by virtue of the absolute nature of Article 3, that the court must have regard to the fact that at some point in the future, the issuing state will comply with its obligations even though it cannot guarantee respect for Article 3 rights from the moment of surrender of the requested person”.²⁶

The Court also pointed to “the lack of a demonstrably functioning health care system available to prisoners, such that he can be guaranteed coordinated access to treatment that he requires within an adequate period of time, also establishes that there is a real risk that he will be subjected to inhuman and degrading treatment if surrendered to Greece”.²⁷

The court refused his surrender.

The respondent was not so fortunate in *MJE v. Kacevicius*.²⁸ Here, surrender was resisted on basis of Lithuanian prison conditions and prisoner violence. The court examined reports of the CPT and in light of the very negative findings by the CPT relating to the conditions in Lithuania, Binchy J. responded to the request thus: “while I have otherwise been satisfied to make an order for the surrender of the respondent, I am not prepared to do so unless the Lithuanian authorities can address to my satisfaction the concerns raised by the CPT about the conditions in and management of Alytus and Marijampolė Prisons or alternatively, confirm that the respondent will not be required to serve his sentence in either of those prisons”.

Following on from responses from Lithuanian authorities, the court was happy to make the order for surrender, despite finding that the issue of inter-prisoner violence was a continuing concern, although conditions had improved regarding other aspects of prisons in Lithuania.²⁹ The offences for which the surrender was sought were “at the lower end”, relating to theft of items which did not have any great monetary value – shrubs and mobile phones total value 400 euro. His argument on Art. 8 grounds, having 2 children under the age of three and his wife being pregnant with their third, was rejected also. The court ruled:

²⁶ *Minister for Justice and Equality v. Kinsella*, cit., para. 65.

²⁷ *Ibid.*, para. 73.

²⁸ High Court of Ireland, *Minister for Justice and Equality v. Kacevicius* [2019] IEHC 434.

²⁹ High Court of Ireland, *Minister for Justice and Equality v. Kacevicius* [2019] IEHC 740. Note that where assurances are sought by the executing authority under Art 15 FD EAW, the executing authority “must rely on that assurance” received from the issuing authority in the absence of evidence to the contrary. This is interlinked with fostering of the principle of mutual trust; see: Court of Justice, case C-220/18 PPU, *ML*, para. 112.

“While I agree with the submissions of counsel for the respondent that the offences of which he has been convicted are at the lower end of the scale as is the sentence imposed upon him, that is not in itself sufficient to displace the public interest in his surrender, because the consequences of his surrender are no greater than the inevitable consequences that will flow from the same in very many cases, or, for that matter imprisonment in this or any other jurisdiction”.³⁰

Clearly, no account was taken of the difference between being held in detention in circumstances where family can visit and one where a person is isolated through a pre-trial or prison term being served abroad!

In *J.A.T.* a case of tax fraud, the person successfully resisted the surrender on Art. 8 grounds, on basis of his medical condition and that he was the sole caregiver to his son who had substantial needs, especially given the delays involved in the case.³¹ By contrast, in *T.E.* a woman was sought for laundering the proceeds of crime and participation in a criminal organisation that was involved in people trafficking for prostitution purposes. She had been granted citizenship in Ireland but her husband was still awaiting citizenship and was therefore not in a position to travel freely from Ireland. They had three young children, all Irish citizens. It was argued that if she was returned to France on foot of the warrant, her Art. 8 rights to private and family life would be breached, since her family would be unable to visit her if she was held in pre-trial detention in France or released on bail but with her movements restricted to France; a French expert had stated that she would be unlikely to get bail, given the seriousness of the offence. The Irish court approached the matter from the accepted principle “that non-surrender on article 8 grounds is possible in a European arrest warrant case, but that having regard to the strong public interest in extradition, and the need for this State to live up to its international obligations, the bar to be vaulted by an objector on Article 8 grounds is set at a high level”.

In this case, the court rejected her arguments based on section 37 (breach of fundamental rights as ground for refusal) on the ground that there was a “very strong public interest” in her extradition and that the court “has not been persuaded that it would represent a disproportionate measure to extradite her”.

While *T.E.* failed to resist her surrender based on fundamental rights considerations, she was nonetheless successful of another ground, and one that has resulted in a number of refusals to surrender requests in Ireland to date.³² In transposing the EAW, the Irish legislation insists that before a surrender can be granted, there must be a decision to “charge and try” the person who is being sought under the warrant.³³ Here, it

³⁰ *Minister for Justice and Equality v. Kacevicius*, cit., p. 38.

³¹ Supreme Court of Ireland, *Minister for Justice and Equality v. J.A.T. no. 2* [2016] IESC 17.

³² A leading case is Supreme Court of Ireland, *Minister for Justice and Equality v. Bailey* [2012] IESC 16.

³³ Section 21A of the Act of 2003 provides: “(1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High

was clear that no decision to try the person had been made in France, and so the surrender was ultimately refused.

In *W.B.*, the argument resisting surrender to face trial on a charge of rape in Sweden was squarely based on the likelihood of pre-trial detention being imposed.³⁴ It was contended that the “Swedish system de-facto involves a presumption against liberty”. While accepting that an argument against surrender on such a basis is indeed strong, the court of appeal upheld the high court’s decision to order surrender, finding that “There is no presumption of necessity for detention, in the sense of an inference recognised by law which stands until the contrary is proved. Evidence of risk is still required to be adduced by the applicant for a pre-trial detention order in every case and the court is obliged to conduct a weighing of the competing interests”.

The court considered the high court was correct in finding that there is not an automatic rule to impose pre-trial detention in Sweden, it merely places “a high evidential burden on a person who is reasonably suspected of a serious offence and who desires to be allowed to remain at liberty”. Accordingly the surrender order was upheld.

In these cases, there would have been no possibility for the court to even entertain the idea that an ESO might follow on after the surrender if surrender was ordered, given that Ireland had not transposed the FD. Arguably there could have been successful prosecutions of the serious offences that underpinned these surrender requests: drug trafficking; tax fraud; money laundering and trafficking in human beings for prostitution; all offences driving the move to the mutual recognition principle in the first place. Instead the requested persons all gained “a form of limited immunity”³⁵ so long as they remain in the jurisdiction of the executing state. As for the case where surrender was ordered, considering the low level of seriousness of the offences at issue, and the plight of a family with two very young children and a third on the way, the requested person would surely have been a perfect candidate for an ESO.

IV. TIME FOR A NEW ESO?

Perhaps the time has come for the creation of a new ESO. It is clearly not being used in its current state, and the reasons for this will hopefully be revealed in the current round of mutual evaluations.³⁶ One reason for its lack of use may lie in the fact that it is simply a product of a different era. The ESO has been in the making since shortly after the im-

Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state”.

³⁴ Court of Appeal, *Minister for Justice and Equality v. W.B.* [2016] IECA 347.

³⁵ A phrase used by O’Donnell J. in *Minister for Justice and Equality v. J.A.T. no. 2*, cit.

³⁶ Above footnote no. 7. The possibilities for its limited use so far identified relate to lack of training, absence of promotion by defence lawyers of the instrument and the belief that it is “a highly complicated instrument on the deployment of which judges have to make swift decisions in the pre-trial phase”. See W. VAN BALLEGOIJ, *European Arrest Warrant – European Implementation Assessment*, 2020, p. 62.

plementation of the EAW. The proposal first appeared in 2004, negotiations were protracted as was typical at that time of requirement for unanimity for third pillar instruments, which accounts for the FD not coming to fruition until 2009.

Since that time, while the possibility for mutual legal assistance did exist,³⁷ the EIO has been implemented, which did not exist at time of drafting the ESO. In Ireland, the detention period in police custody is the sole opportunity available for obtaining any evidence directly provided by the suspect in the form of statements or forensic samples etc., regardless of whether he is remanded in custody or released on bail. There is no culture of bringing the accused before a prosecutor or a judge to be further interrogated as the investigation advances, or of confronting the accused with witnesses or results of forensic tests. This is in sharp contrast to the availability of the suspect as a source of information in many Continental systems during the investigative stage of the process.³⁸ Where a person is held in pre-trial detention, that guarantees their ready availability for any procedures necessary during the pre-trial phase. The EIO should make the ESO easily workable by way of providing mechanisms for appearances of an accused during the pre-trial period to be questioned, face confrontations, etc. while still being able to remain in their state of residence. Moreover, this is now all the more possible using modern videoconferencing technology.

The intervening period has also seen the implementation of the procedural rights measures. A new instrument could clearly link in the provisions of the Directives on access to lawyer, translation, information, and the presumption of innocence. Equally, interaction with the measures in the victims legislative package could also be included.³⁹

The FD EAW was supposed to reform extradition procedure first and foremost by increasing its efficiency. As is evident from the survey of Irish cases above, the ease at which surrender was supposed to work under the EAW is being hampered by applications to resist the warrant, based on issues which could conceivably be remedied by using the mechanism of the ESO without frustrating the aims of the EAW. Cases that have arisen raising the argument of prison conditions might arise less frequently if the person would not need to spend time in pre-trial detention but could be instead released on provisional pre-trial detention and supervised in their State of residence. The same

³⁷ European Convention on Mutual Assistance in Criminal Matters 1959 and Protocols; Convention on Mutual Assistance in Criminal Matters between Member States of the European Union and Protocol to Convention.

³⁸ See generally A. RYAN, *Towards a system of European Criminal Justice: The problem of admissibility of evidence*, London: Routledge, 2014.

³⁹ 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 (the Victims Directive); Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order (EPO); Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

applies in cases that resist surrender based on Art. 5 ECHR relating to lengthy pre-trial detention practices in the issuing State. Crucially, a new instrument could contain a procedure that would more clearly create a procedure for supervision in the specific EAW context. For instance, it is not unusual for judges to release persons requested under an EAW on bail pending the full hearing of the request.⁴⁰ Perhaps an initial communication could be made between the executing and issuing judicial authorities at the endorsement stage on the likelihood of a supervision order being granted following surrender. This could also provide for some link to be made with the domestic bail decision that the issuing State could 'piggy-back' onto.

The principal backdrop for the creation of the ESO was to address the situation of non-nationals who had been arrested while visiting another Member State – it was not conceived of with any great focus on persons sought under an EAW. The EAW came into the equation primarily as offering a possible mechanism for the return of a supervised person in case of breach. It was not designed as a mechanism for improving the efficiency of the EAW.⁴¹ It is unsurprising that consideration was not focussed on the possible benefits the ESO could bring to the better functioning of the EAW system, considering that the ESO was being designed at a time when the EAW was relatively young and therefore any cracks in the system were only slowly starting to emerge.

The ESO has stemmed out of a different legal landscape, one that started out fairly barren that has since become verdant. Amidst this growth, the ESO has become an unproductive shrub smothered by the rest. A fresh grafting may be the best remedial course to allow it to flourish.

⁴⁰ Art. 12 of the FD EAW relates to keeping the person in detention.

⁴¹ The ESO is also interlinked with the other two detention instruments and could make applications for these work more efficiently also: if a person has behaved under an ESO, that creates strong grounds to believe that they will do so likewise under a probation order supervised in their home country. A successful ESO experience would also support a transfer request if sentenced to imprisonment. See Council Framework Decisions 2008/947/JHA of 27 November 2008 on probation and alternative sanctions, and Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.