



Training of Lawyers on EU Instruments on procedural rights in Criminal proceedings (CRIMILAW)

**The impact of the European Arrest Warrant on the application of the
three procedural rights directives**

Noémie Saidi-Cottier

French Lawyer



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The impact of the European arrest warrant on the application of the 3 procedural rights directives



Noémie SAIDI-COTTIER
Avocate au Barreau de Paris



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Decision 2002/584/JAI – adopted 13th June 2002

Decision 2009/299/JHA – adopted 26th February 2009

**The
Arrest
(EAW)**

**European
Warrant**

— **01.**



BACKGROUND

The EAW



- The Framework Decision of EAW was adopted by the Council on **13 June 2002** (Decision 2002/584/JAI)

This Decision :

- replaced extradition arrangements
- simplified cross-border judicial surrender procedure – for the purpose of prosecution or executing a custodial sentence or detention order
- The Framework Decision of EAW was amended by the Council on **26 February 2009** (Decision 2009/299/JHA)

HOW DOES IT WORK?

The EAW



Article 1.1 of the Framework Decision

"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".

WHY?

The EAW



Article 2.1 of the Framework Decision

An EAW may be issued by a national judicial authority for :

Prosecuting a person when the offence for which the person is being prosecuted has a maximum penalty of at least 1 year of prison ;

Or

Execution of a custodial sentence or detention order when the sought person has been sentenced to a prison term of at least 4 months.

CONDITIONS?

The EAW

- Strict time limits
- Double criminality check (not required for 32 categories of offences)
- No political involvement
- Surrender of nationals
- Limited grounds for refusal
- Proportionality check



PROCEDURAL RIGHTS
OF PERSONS SOUGHT
UNDER
AN EAW?

The EAW

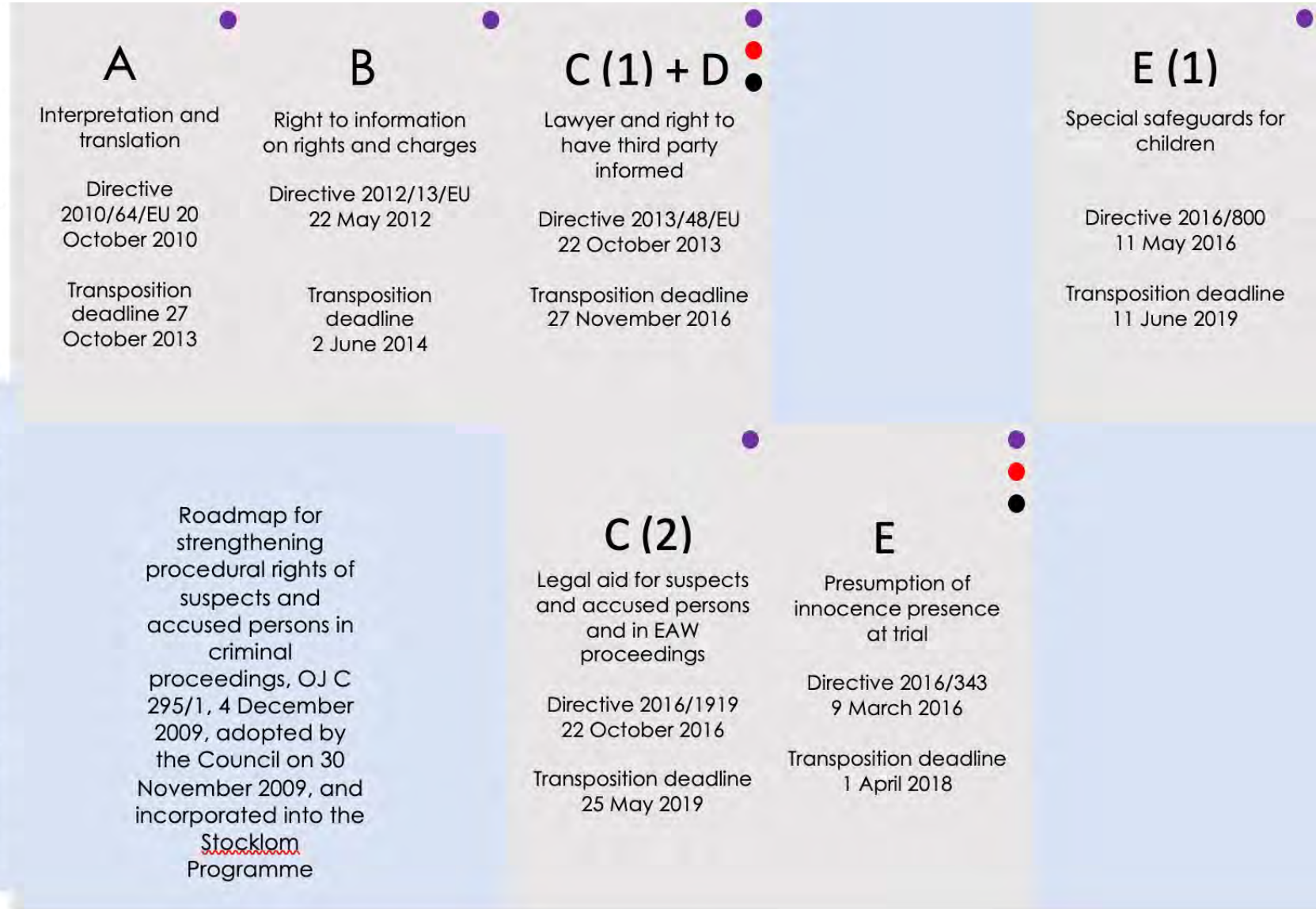
The EAW is based on the principle of mutual recognition and on the confidence of member state in each other's criminal justice systems

Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, OJ C 295/1, 4 December 2009, adopted by the Council on 30 November 2009, and incorporated into the Stockholm Programme

24 EU acts on mutual recognition of judgements (14 regulations on civil cases, 10 framework decisions and 2 directives on criminal cooperation)

Criminal justice

Criminal procedures roadmaps



DK not taking part



UK not taking part



IE not taking part

FOCUS DIRECTIVES :

- ✓ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;
- ✓ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;
- ✓ 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.

The Directive states that the right to access to a lawyer in regular criminal proceedings also apply to EAW proceedings

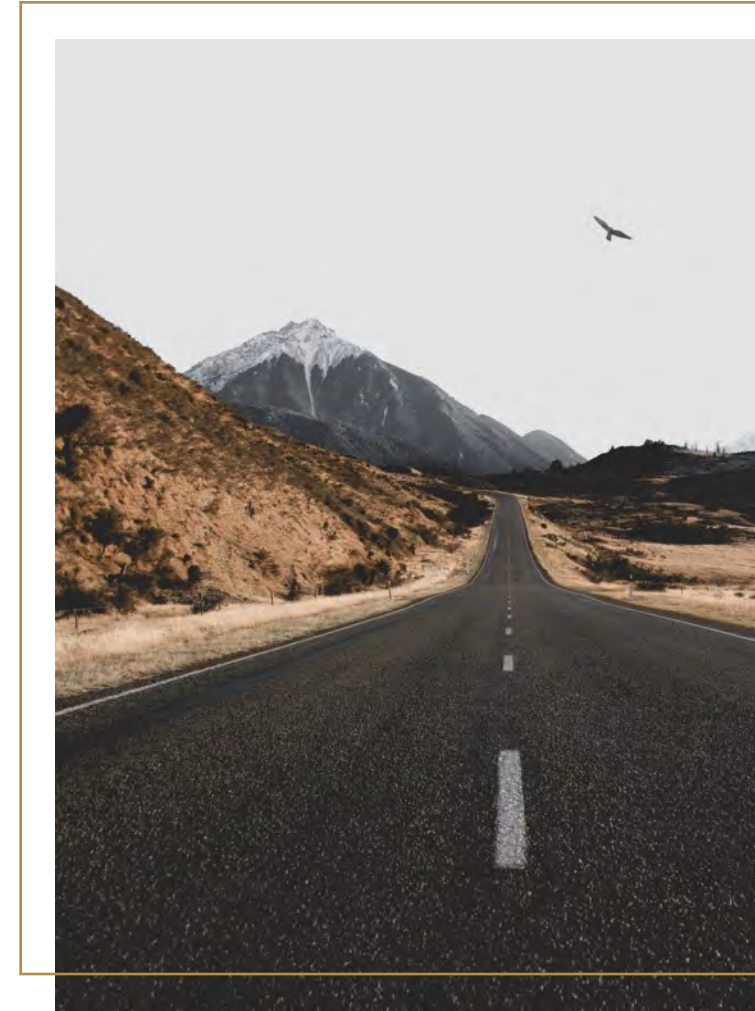
**The impact of the EAW
on the application of the
Directive on the right to
access to a lawyer**

— **02.**

The right of access to a lawyer includes :

- ✓ The right to meet in private and communicate with the lawyers ;
- ✓ The right for the lawyer to participate effectively when the suspected or accused person is being questioned or heard by judicial authorities ;
- ✓ The right for the lawyer, as a minimum, to attend certain investigative or evidence-gathering acts

In the context of EAW proceedings, the Directive establishes the **right to 'dual' legal representation** in both the executing and issuing Member States



In the executing Member State, requested persons must have :



01. The right to a lawyer without undue delay from when they are deprived of liberty

02. The right to meet and communicate with the lawyer representing them ;

03. The right for their lawyer to be present and participate effectively in the procedural acts.

In the issuing Member State, the right to access a lawyer includes :



01. The right of persons arrested to be informed of their right to appoint a lawyer in the issuing Member State (*Article 10 (4)*) ;

02. The right of persons arrested to have the authorities of the executing Member State inform the authorities of the issuing Member State of their wish to exercise the right to appoint a lawyer there (*Article 10 (5)*) ;

03. The right of persons arrested to be provided with information to help them appoint a lawyer in the issuing Member State (*Article 10 (5)*).

Difficulties in implementing the right to access to a lawyer :

-  Provision of information on the right to access a lawyer : the situation and issues are the same as for the provision of information on all other procedural rights. Information is generally given, mostly orally, but not always in writing.
-  The right to be assisted and represented by a lawyer in the executing Member State is generally respected.
-  However, great systemic deficiencies were revealed with regard to the right to access a lawyer in the issuing Member State. Both the provision of relevant information on this and especially the practical exercise of this right are deeply problematic.

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Every individual, suspected, or accused, has the right to be presumed innocent until proved guilty according to the law

**The impact of the EAW on
the application of the
Directive on the right to
presumption of innocence**

— **03.**

The right includes :

Article 4

The prohibition on public references to guilt

Article 5

Measures regarding the public presentation of suspects and accused persons

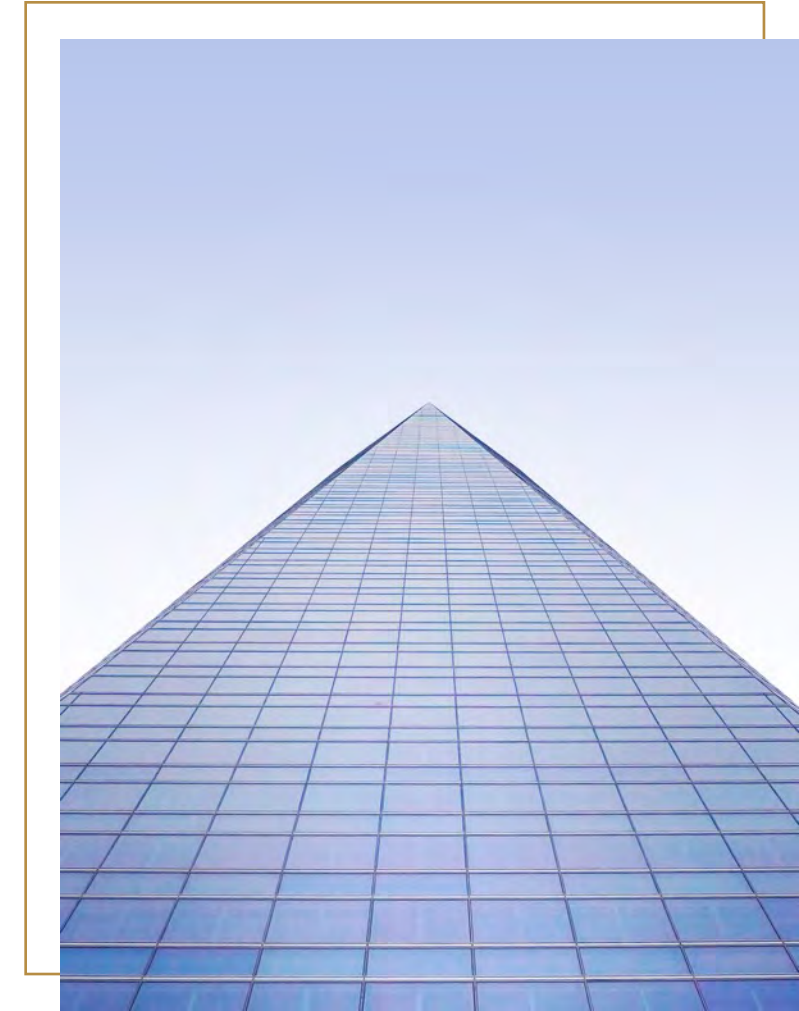
Article 6

Guarantees regarding the burden of proof

Article 7

The right to silence and the right not to incriminate oneself

Example: standard of protection of the presumption of innocence in the context of “in absentia” judgments and the Melloni case (2013)



The purpose of the Directive is to ensure the effectiveness of the right of access to a lawyer provided for under the Directive which we discussed earlier

**The impact of the EAW
on the application of the
Directive on the right to
the legal aid**

— **04.**

In EAW proceedings :



The executing Member State shall ensure that requested persons have a right to legal aid upon arrest until they are surrendered, or until the decision not to surrender them becomes final

The issuing Member State shall ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State have the right to legal aid in the issuing Member State for the purpose of EAW proceedings in the executing Member State.

In EAW proceedings :

There is limited statistical evidence on insufficient mutual trust between the Member States. Therefore, it is also difficult to quantify the problem.

Setting common minimum standards is indispensable to establish the climate of mutual trust which is at the core of mutual recognition instruments such as the EAW.

Today, the main challenge is the full transposition of all the directives' provisions into national law, translating into effective protection of procedural rights for requested persons under the EAW.

LM case, 25th July 2018

Aranyosi and Căldăraru, 2016 : for the first time, the CJEU accepted possible refusals of EAWs due to infringements of the prohibition of torture and inhumane or degrading treatments, due to poor detention conditions.

LM case : the CJEU largely extended the application of the *Aranyosi and Căldăraru* case to the **right to a fair trial**.

Moving forward :
the possibility to refuse on
EAW on the grounds of a
hazard for procedural rights :
the LM case, 25th July 2018

— 05.

Two steps assessment by the executing authority:

1 - First step :

if there is a real risk of the right to a fair trial being breached that is connected to a lack of independence of the courts in the issuing Member State, on account of systemic or generalized deficiencies there. The danger is assessed *in abstracto*.

2 - Second step :

specifically assess if the requested suspect will run the real risk of being subject to a breach of the essence of his fundamental right to a fair trial. The danger is assessed *in concreto*.

This approach was recently confirmed again in the L and P case (17 December 2020)

For the first time, the CJEU explicitly admits that rights which are not also absolute in nature are capable of limiting the operativeness of mutual recognition

- Applicable only in exceptional circumstances

- A new window of opportunity for defence lawyers ?

Case law :

France / Court of Cassation / CR01597

Mr. I. / France

National Court/ Court of Cassation / date: 22/07/2020

The Court of Cassation ruled that the Charter of Fundamental Rights of the European Union does not provide for the right to appeal to be included in the principal rules of due process and dismissed the appeal. Only the failure to appear in person at the trial at which a final decision was taken, after an examination of the merits of the case in terms of substance and law, on the charge of which the accused was convicted and on the custodial sentence imposed, is, subject to certain conditions, grounds for the non-compliance with the compulsory enforcement of the arrest warrant. In this case, Mr I. appeared in person at the hearing when the sentence which the arrest warrant was issued for was handed down. Therefore, the principle of mutual recognition of decisions in criminal matters by the Member States had been observed.

Germany / Federal Constitutional Court Romanian citizen v. Federal state of Schleswig-Holstein National Court / Federal Constitutional Court / date: 09/05/2018

The Federal Constitutional Court allowed the complaint. The court found that the Higher Regional Court was required to submit the issue to the European Court of Justice as the scope of protection by article 4 of the Charter was highly relevant for the case and no national remedy was available. By omitting to submit the issue to the CJEU the Higher Regional Court had violated the plaintiff's right to a lawful judge as warranted by article 101 para. 1 of the German Basic Law. Unlike the Higher Regional Court, the Federal Constitutional Court argued that the ECJ did not finally decide on the minimum requirements for detention conditions under article 4 of the Charter. The Higher Regional Court failed to examine the relevant jurisprudence when concluding that the detention conditions in Romania would not violate EU law.

Case law :

Finland / Supreme Court

Supreme Court decision regarding a request for surrender

National Court / Supreme Court / date: 17/03/2020

According to information provided by the Romanian prison authorities, it was highly likely that A would serve a major part of the four-year sentence in a semi-open prison where the personal space allocated to a detainee is at least two square metres. The Supreme Court noted that the ECtHR has in the case of *Muršić* confirmed the standard of three square metres per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the ECHR. The CJEU has assessed the minimum standards for prison conditions, following the guidelines set by the ECtHR. The Supreme Court concluded that in A's case there was a strong presumption of a violation of Article 3 of the ECHR and Article 4 of the Charter. Such a presumption can be rebutted only if the reductions in the required minimum personal space of three square metres are short, occasional and minor and the detainee has sufficient freedom of movement outside the cell. These criteria must be met cumulatively. Both the ECtHR and the CJEU have held that in cases where a detainee has less than three square metres of personal space, a period of detention around 20 to 27 days cannot be regarded as short, occasional and minor. The fact that a detainee has a possibility to spend part of the day outside the overcrowded cell does not change the outcome of the assessment. The Supreme Court denied the request for surrender.

Case law :

Hungary / Budapest-Capital Regional Court of Appeal
Defendant with foreign nationality and public prosecutor representing the State
National Court/ Budapest-Capital Regional Court of Appeal / date: 01/01/2018

The Budapest-Capital Regional Court of Appeal concluded that the conditions of the execution of the European arrest warrant were met and there was no legal ground for non-execution, thus the extradition detention and eventual extradition of the defendant had to be ordered.

The Regional Court of Appeal (as the second instance court) confirmed that – as a general rule – a serious violation of a defendant's fundamental rights enshrined in the Charter creates a legal ground for mandatory non-execution of the European arrest warrant, and a final judgment establishing the violation is not necessary in order to reach this conclusion. However, the Court was of the opinion that in the Slovak criminal procedure the alleged violation of the defendant's fundamental rights had happened in the investigation phase, and there was no factual basis to presume that the violation would be repeated in the trial phase. The Regional Court of Appeal emphasised that non-execution of the European arrest warrant could not be regarded as a sort of sanction against the issuing Member State for one particular fundamental rights violation. The refusal serves the purposes of protecting the principles enshrined in the Treaty on the European Union and the EU Charter of Fundamental Rights and it can be grounded only on broader, systemic problems.

Case law :

Ireland / Poland : Ireland / High Court / [2012]

The applicant of the case orders the surrender to Poland of the Polish respondent pursuant to the European Arrest Warrant Act 2003, on foot of two European arrest warrants issued in 2006. The applicant acknowledges that the respondent was tried in absentia for the offence which is subject of the second arrest warrant; while controversies arise in relation to the first warrant. In this case, since the respondent was unrepresented by a lawyer, he argues that with a surrender of the respondent would be incompatible with Ireland's obligations to the respondent under either the Convention or the Constitution. The High Court refused to order the surrender of the respondent to Poland. The decision of the court is based on the fact that the applicant provided no cogent evidence to prove that the right to have legal representation at the trial had been granted to the respondent.

NOTE : *A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.*

CJEU – Case law

1 CJEU : 07 November 2020

Article 3(2) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, interpreted in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, precludes a national provision or judicial practice according to which, where the suspect fails to appear when first summoned by the court and a national arrest warrant is issued, the right of access to a lawyer may be delayed until the warrant is executed and the suspect appears before the court.

2 CJEU : 12 March 2020

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, and in particular Article 3(2) thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation, as interpreted by national case-law, according to which the exercise of the right of access to a lawyer may, at the pre-trial stage, be delayed because the suspect or accused person has failed to appear following a summons to appear before an investigating judge until the national arrest warrant issued against the person concerned has been executed.

SOURCES

- *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*
- *European Union Agency for fundamental Rights; Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings (2019)*

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf

