

## **Ensuring cross-border justice for all in the EU: sharing practices and experiences from the ground**

*Primatial Palace, Bratislava, 9–10 November 2016*

### Conference Report

The conference '**Ensuring cross-border justice for all in the EU: sharing practices and experiences from the ground**', organised jointly by the European Union Agency for Fundamental Rights (FRA) and the Slovak Presidency of the Council, with financial support from Norway Grants, aimed to contribute to ensuring *fair, effective* and *accessible* cross-border justice for all in the EU by exchanging and learning from real-life practices and experiences. Around 100 representatives from EU institutions, national governments, legal professionals, national human rights institutions and other 'access to justice' actors participated in the conference. This summary report is a compilation of the main outcomes of the conference, including key messages and practical suggestions.

### **1. Overall findings**

Cross-border justice cases typically exhibit a higher than average level of complexity. In keeping with the three keywords of 'fair', 'effective' and 'accessible' cross-border justice, the speakers and participants discussed current developments relating to the various central concepts in the field. The role of fundamental rights, mutual trust and mutual recognition featured most prominently in the debates.

On multiple occasions during the conference, speakers raised the possibility that stronger mutual trust between Member States might require a change in legal culture. As Michael O'Flaherty, the FRA Director, referred to in his opening speech, most legal practitioners come from a background where their national legal system is presumed to be the 'right' one. Mutual trust and mutual recognition, however, mandate and in fact require that legal officials in Member States look with understanding beyond their own national context. One idea raised during the event in this context was the establishment of an exchange programme for legal practitioners to better understand other legal systems, akin to the Erasmus scheme for students, which could help boost a European ethos into the practice of law in Member States.

Many speakers stressed the paramount importance of fundamental rights for the effective functioning of the common, borderless area of justice in the EU. FRA presented fundamental rights as the foundation on which 'mutual trust', and hence 'mutual recognition' with respect to access to justice, is built. In this regard, Professor Steve Peers in his keynote speech outlined the idea that the EU may have started constructing the common area of justice from the 'wrong end'; that is starting with mutual trust rather than fundamental rights. Professor Dimitry Kochenov's intervention similarly cautioned against the danger of maintaining mutual recognition between Member States on the basis of presumed mutual trust, without acknowledging fundamental rights deficiencies that may exist in practice. It was agreed that the EU should be wary of approaching the relationship between fundamental rights protection and efficiency of cross-border justice as one involving trade-offs.

The conference also recognised the demands placed on legal practitioners who are involved in cross-border cases. National judges, for example, face the considerable task of having to appreciate the legal – and sometimes also factual – situation in another Member State, while at the same time juggling multiple fundamental rights obligations that follow from the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and national constitutions. Given the challenges involved in cross-border cases, many conference participants agreed that national courts should not shy away from seeking advice of the Court of Justice of the EU (CJEU) through the preliminary reference procedure - as also highlighted in interventions by Inge Reine, Judge of the General Court from the Court of Justice of the European Union, and Ján Mazák, former Advocate General at the Court of Justice and Professor of Law.

It was acknowledged that although national legal practitioners have at their disposal a wide array of tools and mechanisms - introduced by EU secondary law - facilitating fair and effective cross-border justice, many of them remain underutilised for a variety of reasons; such as a lack of effective transposition, insufficient awareness or a lack of incentives. There was a consensus among the conference participants, including those from the European Commission, that the challenge today is to properly operationalise and implement the instruments adopted at the EU level, while ensuring that possible gaps in the system are duly and promptly identified and addressed. FRA's work assists in this process, and the two FRA reports launched at the conference – FRA (2016) *Rights of suspected and accused persons across the EU: translation, interpretation and information* ([http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-right-to-information-translation\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf)) and FRA (2016), *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers* ([http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-criminal-detention-and-alternatives\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-criminal-detention-and-alternatives_en.pdf)) – identify areas where further improvements to the fairness, efficiency and accessibility of cross-border justice can be made.

## **2. Fair cross-border justice**

When it comes to the fairness of EU cross-border proceedings, [Steve Peers has identified the developments in the case law of the CJEU](#) on the European Arrest Warrant (EAW) as a cause for optimism. In the *Lanigan* as well as the *Aranyosi and Căldăraru* cases, the CJEU has essentially conceded that the execution of an EAW can be postponed if the prison conditions in either the executing or issuing Member State are systematically unsatisfactory, and if the individual in question is at a 'real risk' of being subjected to such conditions. Taking into account a number of other recent decisions of the Court, such as *Bob-Dogi* or *Dworzecki*, the CJEU's case law is moving from a position of 'automatic' mutual recognition to one qualified by fundamental rights standards.

Most of the discussion in the dedicated working group on ensuring fairness in cross-border criminal proceedings focused on the existing secondary EU law, in particular directives adopted under the Procedural Rights Roadmap. As FRA research has shown, such legislative efforts, however, can only have an impact if they are effectively accompanied by necessary guidance for national legal practitioners on how to apply them in practice. Representatives from the Commission and the Council Secretariat agreed that following years of EU legislative activity, it is important today to focus the attention of both the EU institutions and the Member States on effective application. Continuous exchange of

practices and experiences with the implementation of the directives must therefore become commonplace between Member States. This will, in turn, help EU institutions and Member States to undertake rigorous and critical assessments of possible gaps in the existing mechanisms with a view to further boosting the fairness of cross-border justice.

### **3. Effective cross-border justice**

Well-functioning mutual trust among national courts and other actors is necessary for the principle of mutual recognition of judgments and judicial decisions to work. It is no secret, however, that the existing instruments at the EU level - chiefly among them the EAW and the European Supervision Order - have seen mixed results in terms of their implementation.

A recurrent theme at the conference was the overuse of the EAW and the comparative underemployment of the European Supervision Order. There are potentially significant advantages for legal practitioners and officials to rely less on the EAW and more on the European Supervision Order in terms of both effectiveness and efficiency of cross-border justice. Nevertheless, as the framework for doing so is already in place, this change feeds again into the overall challenge of properly implementing and applying EU legal instruments in cross-border cases.

As outlined in FRA's research findings,<sup>1</sup> other mutual recognition instruments, such as the Framework decisions on the transfer of prisoners and on probation and alternative sanctions, are in need of similar improvements. In order for them to function well, they have to be effectively used across the EU. It is often beneficial to provide further practical guidance to national legal practitioners to support the effective application of these measures in practice, as well as to gather and exchange experiences of how they are being used. This, in turn, is essential towards assessing the 'performance' of the instruments, including fundamental rights concerns. The instruments, should they be properly and more systematically applied, could also positively impact on human rights protection, by, for instance, improving detention conditions, strengthening social rehabilitation and providing incentives for greater use of alternatives to detention.

### **4. Accessible cross-border justice**

A lack of relevant information in an appropriate form about legal standing, judicial and alternative remedies, legal costs or legal aid regimes can represent an obstacle to justice in many national jurisdictions, and this applies even more in cross-border proceedings due to their complex nature.

Evidence shows that providing relevant practical information and targeted guidance to individuals about their rights and redress avenues can facilitate their access to justice. The tools that contribute to these objectives are increasingly - but not exclusively - electronic. They include initiatives such as the [European e-Justice portal](#), operated by the European Commission, or the ECtHR-FRA (2016) *Handbook on European law relating to access to justice* ([http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-ecthr-2016-handbook-on-](http://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-)

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<sup>1</sup> FRA (2016), [Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers](#) (Luxembourg, Publication Office)

[access-to-justice\\_en.pdf](#)). The popularity of these and other information tools was confirmed at the conference, and participants reiterated that they will need to be disseminated and used more widely in the future to facilitate cross-border access to justice for all.

The close relationship between improved access to justice and better information necessitates that access to relevant information is treated with at least as much seriousness as substantive issues of justice. The participants of the working group on accessible cross-border justice stressed the importance of availability of information not only in a legal language, but also in lay terms. This becomes obvious in cases involving persons with disabilities, children and [vulnerable or disadvantaged groups](#), where the requirements for information to be understandable and in a tailored format are even greater.

## 5. Ways forward

The following represents a list of the main ways forward suggested by conference participants on the basis of the exchange of their experiences and practices on the ground, with a view to ensuring fair, effective and accessible cross-border justice:

- Ensuring that the EU system of a common area of justice works together as a whole; not as a patchwork of instruments but as a uniform structure;
- Moving from automatic mutual recognition based on presumed trust to a more qualified approach based on a fundamental rights-based assessment;
- Collating information and data from existing monitoring mechanisms concerning the fundamental rights situation in different countries, and making them available in different EU languages in order to help national legal practitioners when deciding on cases relating to cross-border issues, as well as policy makers when formulating policy;
- Creating accompanying materials and other targeted and practical guidance for legal practitioners, such as handbooks, check-lists, databases or e-tools;
- Creating possibilities for more direct personal communication between judges dealing with cross-border cases, which would facilitate the exchange of knowledge and experience;
- Further enhancing and making more effective use of existing cross-border tools, for instance those available through the European e-Justice portal, such as videoconferences in EAW cases during the pre-trial and investigation process; “find a lawyer” or [e-Codex project](#), which pioneers the safe exchange of information in legal proceedings across borders in the EU, as well as supporting interoperability (with appropriate safeguards) and integration of Member States legal procedures;
- Raising awareness of procedural rights, and of EU instruments more generally via enhanced training, and facilitating more regular exchanges between practitioners from different jurisdictions on what works and what does not, including through available European networks of mutual recognition instruments;
- Providing more and better information to individuals on how and where to find help – be it from lawyers, translators, ombudspersons or others – given that expert assistance is ultimately needed in most legal cross-border situations.