



A project funded by the EJN

## **Regional meeting ‘Compensation after detention based on an EAW’**

**Paris, 22 September 2017**

### Introduction

Most EU-member states enable former defendants, who have previously spent time in detention on criminal charges, to claim financial compensation if their case has subsequently ended in acquittal or if it has been dismissed. In some countries there are procedures for such claims within the criminal law system; in others the ex-defendant must file a claim at a civil court.

However, on the transnational level the situation is less clear-cut. Experiences with the European Arrest Warrant (EAW), give the impression that national compensation mechanisms do not fully cover cases in which the detention has been the result of the execution of an EAW. Court decisions can be inconsistent and sometimes cause results incoherent with the legislation in the involved Member States. Also, a lack of communication between the issuing state and the executing state can result in compensation in both two countries or in neither of the two member states involved.

For that reason the Amsterdam Center for International Legal Assistance (further: IRC) has initiated a European Judicial Network (EJN)–project, “compensation for unjustified detention in EAW-cases”. (Representatives of) the partner countries (France, Germany and Spain have joined the project.

The aims of this project are twofold. First of all, we aim to increase awareness of the functioning of the compensation mechanism. In order to do this, the participating countries in this project have presented the existing mechanisms for compensation for detention under the national procedure and compare those with those that apply when an EAW has been executed. The delegates have also highlighted practical difficulties that have arisen in cases where compensation might be called for, e.g. because an EAW has been refused or withdrawn.

The second aim is to propose solutions to the difficulties, uncertainties and forms of injustice in the field of compensation for unjustified EAW-detention with the intention to contribute to a better functioning of the system and to achieve that EU citizens have access to justice.

## Methodology

On 22 February 2017 the European Judicial Network decided to award the application for the organization of a Regional Meeting on the above mentioned topic. Subsequently, the IRC held a preparatory meeting at the Prosecutor's Office Amsterdam on 27 March 2017. The Dutch project members determined the scope of the research and settled on a time frame of the project. Besides the four project members from the IRC Amsterdam, the fifth delegate was a senior criminal law researcher from the Bureau for Criminal Law Studies (for the list of project members, see Annex 1).

Thereafter, the Dutch project team drafted a questionnaire and sent it on 31 May 2017 to the EJN Tool Correspondents of the 28 EU Member States (see the Annex 2). It was decided to spread the questionnaire EU-wide in order to achieve a wide scope for the research, wider than just the four participating Member States that would participate at the Regional Meeting in Paris in September 2017.

As of June 2017, the replies to the questionnaire were submitted by the Member States to the IRC. By the end of the project in November 2017 eighteen Member States cooperated in this project. It regards: Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Lithuania, the Netherlands, Poland, Slovakia, Spain, Sweden, United Kingdom. In August 2017 the project team started working on a compilation of the answers in order to be able to sketch the overview of the national laws, the national procedures and the practical implications in the examined Member States, at the Regional Meeting in Paris.

The project team has engaged two experts in the field of the EAW that have done research on the topic of compensation in the past. It concerns Ms. Anne Weyembergh, Professor at the Université Libre de Bruxelles and Dr. Henning Bang Fuglsang Madsen Sørensen, Associate Professor at the University of Southern Denmark (Odense).

### Regional meeting 'Compensation after detention based on an EAW', Paris, 22-09-2017

The meeting was chaired by Ms Leonie Lunshof, senior legal advisor at the Center for International Legal Assistance, Prosecutor's Office Amsterdam, the Netherlands. The program of the meeting is attached to this report (see Annex 3).

The introduction to the topic was given by Mr Kasper van der Schaft, Head of the Center for International Legal Assistance Amsterdam and prosecutor at the IRC. In the morning the four partner countries in this project presented the national law, the procedure of the national compensation mechanism and the current jurisprudence on compensation claims after an arrest on an EAW. An attendance register is attached to this report (see Annex 4).

Presentation by Mr J. Ettenhofer, senior prosecutor Munich, Germany

The first presentation on the national compensation mechanism was given by the German representative, Mr Joachim Ettenhofer, senior prosecutor at the Office of the Prosecutor General Munich, and EJM CP (for the PPP, see Annex 5). He stated that for compensation, the preconditions of §2 StREG (law on compensation for measures of criminal prosecution) have to be met. If the defendant is acquitted or the proceedings have been terminated due to compulsory legal provisions or the court declined to open main proceedings. Compensation could also be paid if the proceedings have been terminated based on discretionary reasons, if it seems just (based on §3 StREG) and if the court orders a discharge or the sentence is less severe than the time already spent in detention (based on §4 StREG). Firstly, it is necessary for the defendant to get a court order stating that he has a right to get compensation. The criminal court makes this decision in the judgement or, if the proceedings have been terminated by the prosecution service in a separate court order. In the latter case the defendant has to make an application for the court order within 1 month after having been notified about the termination of the proceedings and his right to ask for compensation. When the decision on the right for compensation becomes final the prosecution service has to notify the defendant about the formalities and deadlines for making a claim for compensation (i.e. stating what amount of money he wants to get for what kind of damage). The deadline for this claim is 6 months after the notification. A claim for compensation is only possible within 1 year after the court decision on the right for compensation became final.

The claim for compensation is sent by the Prosecutor's Office to the Prosecutor General's Office which decide on the claim. If the defendant is not satisfied by their decision he could file a claim to the civil courts against the state. Both pecuniary and non-pecuniary damages can be compensated. All kind of damages caused by the measure of criminal prosecution could be compensated in principle.

In the German law there is no specific legislation on compensation after an unlawful arrest based on an EAW. A claim for compensation based on the StREG, the applicable German law, can only be made, according to jurisprudence, if the defendant has been detained unlawfully due to a fault of the German authorities. It happens from time to time that in EAW cases after the refusal of an EAW by the German executing authorities, the defendant asks for compensation based on the StREG. These claims are always rejected by the court because these legal provisions can't be used as basis for the claim.

Mr Ettenhofer is of the opinion that compensation for detention should always be provided by the issuing state, unless there has been a fault on the side of the executing state and therefore the detention was unjustified.

*Lack of references to compensation in EAW FD*

Mr Ruiz stressed that there is no specific provision within the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (hereafter, EAW FD) foreseeing compensation for persons who have suffered unjustified detention on EAW cases. The Spanish Act 23/2014, on mutual recognition of judicial decisions in criminal matters in the EU (AMR hereinafter) contains some references to “*compensation*”, but always in the context of either compensating victims of crime or compensating third parties or Member States for damages that might have been caused in relation to international cooperation (See articles 15, 25, 173.2 b) and 3, 175.1, and 2) .

*Interplay of supranational and national legal systems*

The operation of the extradition process envisaged in the EAW FD requires a requesting (issuing) Member State that issues the EAW, normally in the form of an alert for the requested person in the Schengen Information System (SIS), pursuant EAW FD Articles 9 and 10, and a requested (executing) Member State. Once the sought person has been found in the territory of the latter, the judicial authorities of both Member States shall cooperate to determine whether the surrender is going to take place and coordinate the extradition process. In so doing they apply different sets of rules, although closely connected different in kind: each national Act transposing EAW FD, and the Framework Decision itself, apart from other supranational texts as CFREU, ECHR and their Constitutions. Further to that, case law of Supreme and Constitutional Courts (in those Member States where such Court does exist) complete the picture. It would thus be advised a careful scrutiny of each particular situation in order to be able to determine: on one hand if an unjustified or unlawful detention has taken place and on the other hand which Member State (issuing or executing) shall be regarded as liable for such an infringement.

*Which Member State should pay compensation where it is appropriate*

Determine the situation and the Law on this point appears not to be easy. Some examples might illustrate this point: grounds for refusal. The decision denying the surrender of the sought person, based on EAW FD Articles 3 or 4, may lead to the conclusion that the time such a person has spent in prison or under arrest could be regarded as unjustified or unlawful. It could be sustained by the lawyer of the arrested person but not every refusal determines automatically that the period under arrest suffered by the sought person while the extradition request was examined shall be regarded as unlawful. The verification of the circumstances foreseen in EAW FD Article 3, do not lead us to necessarily conclude the unlawfulness of the detention, unless it is undoubtedly proven that the issuing Member State authority did know in advance the existence of those circumstances. As for the optional grounds for refusal, EAW FD Article 4 and 4a, it is even more difficult to determine the hypothetical accountability of the Issuing Member State provided there is a degree of uncertainty derived from the nature of these grounds which may or may not amount to justify the refusal of the extradition request.

There is an additional consideration we have to make in these cases. Apart from the difficulties to determine, in any case, whether there has been an unjustified detention and which Member State should be regarded as liable for the damages suffered by the arrested person; the fact that the extradition has been refused by any given Member State does not mean that in a future a different Member State shall necessarily assess the situation exactly in the same way. In theory it is possible to have the sought person arrested in a different Member State which agrees to the extradition. In that event, pursuant EAW FD Article 26.1, the time spent in detention shall be deducted from the total period of prison to be served in the issuing Member State as a result of a custodial sentence or detention order being passed. Hence compensating for unjustified detention and later on deducting such a period would appear as problematic and highly debatable.

#### *Fundamental rights*

A similar problem may appear in relation to this aspect. Fundamental rights-related issues although not directly worded by EAW FD as a ground for refusal, shall be regarded as such. Focusing on recent CJEU judgment in joined cases Aranyosi/Caldararu there are a series of possibilities for the executing Member State prior to decide whether to grant the extradition, a series of steps to be taken but at the very end the CJEU leaves the decision to the appreciation of the authority of the executing Member State. The question is not clear yet again, and there are still open forthcoming chances for the extradition to be granted by another Member State in a future. The additional problem here would be if the extradition is denied on the grounds of preservation of fundamental rights relating with overcrowding of prisons or subhuman conditions, it is clear that, in any case, should be the issuing Member State the one carrying the compensation burden, which in turn should be scarcely compatible with the situation of the other persons in prison in that issuing Member State enduring similar conditions and not entitled to compensation. In the same vein, proportionality-related issues may give rise to similar problems. On the other hand typical procedural matters such as mistakes happened in identifying the sought person, with the wrong one detained and arrested for some days, or too lengthy of slow extradition proceedings (among others) may demand a careful consideration to conclude which authority, which Member State was responsible for them. To close this heading we should bear in mind that within the model of judicial cooperation based on the mutual recognition scheme different types of instruments, serving different purposes, are inserted. Amongst those purposes have a very remarkable significance the ones aimed at favoring the circulation of final criminal decisions imposing custodial sentences and at favoring the circulation of extradition requests. The EAW FD and the Framework Decision on the transfer of sentenced persons (909 FD hereinafter) are part of this nature. The latter in a neat and exclusive way of transferring sentenced persons with a view to facilitating their social rehabilitation, while the EAW FD can serve two purposes essentially: on the one hand surrender of persons to the Member State where they have been sentenced with the view of serving their sentences (so called conviction cases), and on the other, surrender a sought person to another Member State for the prosecution or investigation of a crime (accusation cases).

These two Framework Decisions share the importance of being related to personal liberty, therefore are directly called to impact on one of the most significant fundamental rights of the person and hence are likely to interfere with the right to an effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. The mutual recognition scheme's features are basically connected with the notions of efficiency and agility in the cooperation, being its most relevant characteristics the following: simplification procedures in order to look for a system as close as possible to the one of national cooperation, direct contact between Judicial authorities avoiding the ministerial route or recourse to central authorities, drastic reduction of grounds for refusal, widespread use of mandatory forms to request cooperation, possibility of surrender of nationals and exclusion from double criminality control for a wide range of infringements. This starting point places the judicial authority of the requested Member State in a position where the extradition warrant has to be seen in principle as lawful and justified and where the steps to surrender the sought person must be taken, dealing with the request in a manner somewhat similar to that of dealing with a request from a national Judge.

#### *The compensation procedure*

Depending on which Member State might be found liable for the damages caused by the unjustified detention (issuing, executing or even both of them) the compensation procedure would be different. Depending on the residence of the person who has been unlawfully arrested it might be more difficult for him to sue a State which is not that of his or her residence. It may be advisable to reflect on the opportunity of adopting a scheme similar to that existing to compensate victims of crime in cross border situations, set out by Directive 2004/80/EC. That Directive ensures that each EU country has a national scheme in place which guarantees fair and appropriate State compensation to victims of violent intentional crimes. It also ensures that compensation is easily accessible regardless of where in the EU a person becomes the victim of a crime.

#### *The Spanish legal situation*

The situation so far has been very restrictive in Spain where Articles 106.2 and 121 Spanish Constitution, were developed in this field by Articles 292 to 296 of the Act on the Judiciary. Regarding compensation for pre-trial imprisonment, Article 294 of the Act on the Judiciary restricts the scope of the compensation to those cases where it can't be proved that the actual event constituting a crime has occurred; this would be a major obstacle when it comes to tackle compensation issues in the context of EAW. However, the Jurisprudence of ECtHR (see cases *Tendam v. Spain*; *Puig Panella v. Spain* *Vlieeland Boddy and Marcelo Lanni v. Spain*) has led our Constitutional Court to consider desirable a broader construction of the aforementioned Article 294 in the light of Strasbourg's doctrine which shows that the principle of presumption of innocence shall not be undermined by legal framework or the consequent case law denying compensation on the grounds of not having a decision filling the criminal proceedings or acquitting the accused person based on the non existence of the fact. In the words of the judgment there should be no qualitative difference between acquittal or dismissal of the case

on the grounds of non-existence of sufficient evidence against the accused from that resulting from the demonstration of the absence of the fact or of the participation of the accused in an ontologically existing fact, it must be concluded that the non-existence of the ontological fact is equivalent to the non-existence of the procedural fact (for the presentation of Mr Ruiz, see Annex 6).

Ms Conde illuminated the Spanish applicable law by presenting recent case law on compensation.

Presentation by Ms C. Guillet, Head of BEPI, Paris and Ms C. Fabre, Head of Bureau du contentieux judiciaire et européen

In France, the compensation statute of a wrongful imprisonment was enforced by a Law n° 70-643 of 17 July 1970, which was deeply reformed by :

- Law n°2000-516 of 15 June 2000 (articles 70 and 71) and Decree n°2000-1204 of 12 December 2000;
- Law n° 2000-1354 of 30 December 2000 (articles 1 through 7),
- Law n° 2004-204 of 9 March 2004 (article 103) on adaptation of justice to the evolutions of criminality.

Article 149 of the Criminal Procedure code created a right, and not just a possibility, for full compensation of damages, whether they be pecuniary or non-pecuniary, suffered from a wrongful imprisonment. Any person who has been wrongfully convicted throughout a criminal action ended by a final decision of innocence (that encompasses release without being charged or charges dropped, or trial followed by acquittal, or when conviction has been overturned), has a right to claim full compensation of the damages caused by the wrongful detention.

The legal provision also created a double level of jurisdiction, namely at the first instance, the claim is examined by the First President of the Court of Appeal (“Premier président de la cour d'appel”) in which jurisdiction the decision dropping charges was delivered. Furthermore, the National Commission for compensation of detention (“Commission nationale de Réparation des détentions” - CNR), which is a civil court, acts as a review court when the first instance court decision is challenged either by the claimant, the representative of the French State before civil courts (“agent judiciaire de l’Etat” – AJE ) or by the General prosecutor before the said appeal court.

Those proceedings pursuant to article 149 of the Criminal Procedure code are also applicable to compensation claims initiated by people who have been tried and convicted, have exhausted all appeals but who later have had their convictions quashed in an extraordinary retrial (article 626 of the Criminal Procedure code).

*Admissibility requirements*

The law provides strict admissibility requirements. Firstly, the formal requirements: the claim must be filed with the court registrar within six months of notification of the final innocence decision. This time for suit is mandatory and subject to no regularization or application for relief.

The claim must also be signed and mention the sums claimed. Secondly, the substantive requirements: the claimant must have been granted a final decision of innocence.

No compensation will be possible if the final court decision is based solely on the following:

- Exemption from criminal responsibility under article 122-1 of the Criminal code
- Amnesty subsequent to imprisonment
- The time limit for prosecution expired after the liberation of the convict
- When a person was subject to detention after having purposely accused herself/himself or let herself/himself wrongfully accused in order to prevent prosecution of the perpetrator
- When that person was at the same time detained for another cause.

*Defences that may not be invoked*

The foundation of the decision to detain may not be raised by the AJE as a justification for denying compensation. Also, the culpability of the claimant (for instance when charges had been dropped for lack of evidence) may no longer be invoked before the court since the June 15, 2000 law.

Pursuant to article 149 of the Criminal Procedure code, compensation of non-material damages will only be granted if it is directly and exclusively linked to the incarceration. Any compensation request regarding court proceedings (investigation and trial), qualification of the facts investigated, damages caused by prosecution, legal supervision or circumstances of arrest, will be rejected. Therefore, the period of police custody (before actual prosecution) will not be compensated under article 149. Also, protestations of innocence of the claimant during prosecution or during incarceration, the feeling of not having been heard by judges or the multiplication of applications of release will not influence the amount granted as compensation. Lastly, compensation of non-material damages will be decreased (by half or by two-thirds according to the form of execution of the sentence) when serving sentence to an open or semi-open establishment framework.

The French legal system does not provide for compensation for damages as a result of measures imposed for surrender purposes. In France, the person who has been arrested upon request of the issuing State is only eligible for compensation if the issuing State is France. Therefore, the period of detention accomplished abroad upon request of France, acting as the issuing state of a European warrant, must be compensated by the French state. On the contrary, a person requesting compensation due to the execution, on French territory, of a European warrant issued by another state but France, will not be eligible for compensation (for the PPP see Annex 7).

Presentation by Ms F. Molenkamp, assistant prosecutor and Ms U. Weitzel, prosecutor in Amsterdam, the Netherlands

The Dutch surrender Act contains a special provision, which allows compensation for unjustified EAW-detention (article 67 Surrender Act). The provision allows the compensation in cases, in which the Court has refused the surrender to the issuing State. The Code of the Criminal Procedure articles, 89 & 90 Criminal Code concerning compensation (also) applies via article 67 of the Surrender Act. Article 89 CCP prescribes a few *formalities* which need to be observed when applying for compensation and Article 90 PCC states that compensation is allowed when and if, according to the opinion of the Court, all circumstances considered, *grounds of fairness* exist.

This means that the arguments to grant the compensation should be reasonable. The judge may decide not to grant compensation or lower the amount. For example, if the claimant himself caused the long period of pre-trial detention, this may be a reason for the judge to lower the compensation. The amount of compensation may not be influenced by the vision of the judge on the guilt of the suspect nor that he used the right to remain silent. However, the amount can be influenced because for instance, the suspect made a false declaration. The judge may also decide that the unjustified detention is deductible from another prison sentence.

Case law has provided some circumstances which lead to higher compensation. For example, a single mother raising 3 kids; being a suspect to a very serious offence like terrorism or murder; cases involving a lot of media attention; circumstances that although the suspect was acquitted he will always suffer from reputation damage, a higher age.

*Formal assessment*

When assessing a request for compensation the first step is to check the formal requirements. The claim for compensation needs to be filed within 3 months after the surrender case has ended. The surrender case is ended when either, the Court has refused the surrender, or the EAW was withdrawn, or in case the Prosecutor takes the decision to refuse the EAW.

*Material assessment*

The second step is to check if the claimant is admissible in its claim. Article 67 Surrender Act states that this is the case if the Court has *refused* the surrender. This implies that in every other case the claimant is not admissible in its claim. The Court reasons since the decision of the Court of Appeal 17-6-2009 that the legislator meant to limit the compensation in surrender cases to the cases in which the surrender was refused, considering that in every other case the executing State can not be held responsible/reproached for the unjustified detention. So in case the EAW was withdrawn, no matter what reason, the claimant is inadmissible; if the Prosecutor takes the decision to refuse the EAW (and never takes the case to court) the claimant is also inadmissible.

However there have been a few cases, in which the Court decided dissentingly. In these cases compensation was allowed regardless of the absence of a refusal decision by the Court. In most of these cases the Court considered that the State (or the public prosecution) was nevertheless reproachable for the unjustified detention. Subsequently, the Dutch team presented some case law (for the PPP, see Annex 8).

Presentation by Mr H. Bang Fuglsang Sorensen, academic at the Judicial Institute Odense, Denmark

Mr Henning Sorensen had done quite some research on the compensation mechanism in the past. Furthermore, he had written a PhD on the subject in 2014. His involvement in this project seemed of utmost importance and his contribution to the regional meeting was indeed fruitful and constructive. He raised several questions like the situation when Denmark has arrested a German citizen on a German EAW. Then it appears that the detention was for some reason unlawful. When the Danish judicial authorities are of the opinion that it was not their mistake, but nonetheless Denmark will be willing to pay compensation it might be interesting to take into account the differences in rates per diem. Denmark might ask Germany for reimbursement of 875 euro for the first day and 105 for the next days, since Germany would have paid 25 euro's per diem. One might also ask the question whether Denmark might take this already into account when assessing on the claim.

Henning distinguishes three different compensation regimes in EU criminal law:

The principle of authority – the executing state is responsible:

- The freezing order, the confiscation order, the EEW and the EIO.

The principle of proxy – the territorial state is responsible:

- The Schengen Convention, the EIO and JIT's.

The principle of requisition – the issuing state is responsible:

- The EAW, at least in some Member States.
- Case Law of the ECtHR.

Additionally there has been discussion about liability and responsibility on the one hand and access to justice on the other hand. Some executing states might say that no clear mistake has been made, only satisfaction of the duty of Mutual Trust by arresting the individual. The arrested person however risks to be deprived of compensation or to receive compensation with a huge delay, since it is necessary to start a proceeding in the issuing state, that is not your home state.

Some of his points of reflection were:

- ECHR demands an enforceable right to compensation for deprivation of freedom...
- ... but state immunity bars the use of national courts in the home MS of the surrendered person...
- ... even though a private party, responsible for the same damage, would be sued at the national court of the home MS of the injured person...

- ... so the surrendered person thus in general has to use the courts and laws of the issuing state...
- ... even though the Union Citizenship prohibits an disadvantaged position following a border crossing...
- ... and the surrendered person suffers the loss in the state, where the person lives...
- ... and the levels of compensation in practical terms effective prevents any attempts to claim compensation.

Henning has presented arguments pro and arguments contra compensation by the following:

- The issuing MS:
  - Pro: it is the issuing MS that "owns" the case"
  - Con: Difficult/impossible to file a claim in another MS
- The executing MS:
  - Pro: The executing MS makes the initial arrest
  - Con: The executing MS only has control of the surrender
- A EU fund:
  - Pro: EAW is an EU invention
  - Con: According to which laws – and what amounts?
- Something similar to the rules for victims:
  - Pro: Easy to administer
  - Con: Compensation levels may not cover the loss
- A Reimbursement regime based on where you live
  - Pro: The claim is handled by known laws and appropriate amounts
  - Con: Administration

(For his PPP, see Annex 9).

Presentation by Prof. A. Weyembergh, University of Brussels, Belgium

Ms Anne Weyembergh has written a Research Paper on the EAW 'Critical Assessment on the EAW Framework Decision', that was completed in 2014. She evaluated the EAW and twelve main issues were reflected upon. One of the issues was the Compensation mechanism. Her paper, specially the chapter on Compensation, inspired the Dutch project members to start a comparative research together with other EJM contact points and academics.

According to Anne, the exercise of the right to compensation suffers from two main problems. Firstly there are important differences among compensation mechanisms at national level. These differences have been underlined in the context of extradition in the framework of the CoE PC-OC. They concern time limits for claiming compensation and amounts awarded. The study also revealed that national compensation mechanisms are not necessarily adapted to transnational cases and that compensation is not always awarded for detention suffered abroad in extradition cases. Moreover, not all states provide for compensation when they withdraw an extradition request, or when they arrest and detain a person at the request of another state without extradition taking place.

Secondly, EU rules establishing the duty to ensure fair compensation in EAWs cases and organizing the allocation of liability between the issuing and executing states do not exist.

Former discussions in the CoE PC-OC Committee on this subject have led to the conclusion that “compensation of persons is a very important question, in particular as it affects human rights, which would deserve further consideration by the PC-OC at a later stage”, but no recommendation or initiative followed. Interestingly, the EU has intervened in the field of compensation for *victims* of crime but has not yet addressed the issue of compensation for unjustified detention on the basis of EAWs. The lack of coherence among MR instruments is again to be noticed since at least one of them, i.e. the freezing FD, contains a provision allocating liability, although it does so in a limited way.

Anne states in her paper that EU legislative action is advisable, and should ideally:

- ensure that national compensation mechanisms are applicable to EAWs cases;
- ensure that the person concerned can bring an action in the MS of residence. Such a right would diminish the risk that the person does not claim compensation because of the burden of lodging an action in another state. The solution would mirror the right granted to victims of crime. However, certain adaptations will be necessary in order to account for the EAW specificities.
- in relation to the previous point, introduce specific rules allocating responsibility between MSs. An EU dispute settlement mechanism should be envisaged for cases where no agreement is reached between the concerned states. Such a mechanism is necessary, even though in most cases responsibility will primarily lie with the issuing state. This covers, for example, cases where the issued EAW was unlawful (e.g. when the EAW is adopted in non-compliance of domestic legislation), where unverified data about the person was transmitted or, where following surrender, the person was acquitted of the offence that gave rise to the EAW. The period of detention spent in the executing MS awaiting surrender should, in these cases, be considered for calculating the compensation due. This approach is in line with the ECtHR’s case-law, in which it has been stated that “in the context of an extradition procedure, the requested state should be able to presume the validity of the legal documents issued by the requesting state and on the basis of which a deprivation of liberty is required”, and that it seems clear that detention and arrest “having been instigated by a requesting country on the basis of its own domestic law, and followed-up by the requested country in response to its treaty obligations, can be attributed to the requesting country notwithstanding that the act was executed by the requested country”. However, in other less frequent cases, responsibility may lie with the executing state. This covers, for example, cases where the national authorities do not diligently verify the identity of the person they arrest, or where the person has already been judged for the same offence, thus infringing the *ne bis in idem* principle. In some MSs, such cases might not give rise to compensation because the assimilation with a purely national case is not granted. A last category of cases covers situations of joint responsibility or situations in which neither of the two states takes responsibility. These are perhaps the most complex, and underlie the need for an EU dispute-settlement mechanism. In order to guarantee that the person receives compensation without delay, an EU fund could be set up. This fund would grant compensation to the person, then turning to the MS/MSs held responsible for reimbursement. Criteria should be developed to determine the amounts to be awarded, ensuring a fair compensation which does not lead to unjust enrichment.

In view of the financial difficulty linked to such rules, a two-step approach could be followed. In a first stage, in which consideration is given to whether other MR instruments could also give rise to unjustified damages, the abovementioned rules could be detailed and inserted into an EU horizontal instrument. As mentioned earlier, limited provisions already exist in some MR

instruments – i.e. the freezing FD – but they are incomplete and show a regrettable lack of coherence among MR instruments. Considering the sensitivity of the financial considerations of such an ambitious proposal, it might be advisable to limit the scope of these rules to misidentification cases, which are the most unfair, and remain marginal. The costs they give rise to are thus not significant. Extension to other cases, eventually including prosecution EAWs that end up in acquittal, could follow as a second stage. Another possibility to circumvent MSs' reluctance would be to insert a general principle consecrating the right to compensation, to be later developed in an EU independent horizontal instrument.

Ms Weyembergh stressed that she strongly wanted to spur the EJM contact points on to share the outcome of this comparative analysis with other EAW experts. Furthermore she encouraged the partners to this meeting to develop a possible product in order to achieve improvements to the compensation mechanism and to the access to justice in this respect.

#### Presentation by Ms L. Lunshof, senior legal advisor at the IRC Amsterdam, the Netherlands

In session III of the program an evaluation of the replies to the questionnaire of all examined Member States has been given by Leonie Lunshof (for the PPP see Annex 10).

The replies to the questionnaire have been analyzed and the document 'Compilation of replies' has been distributed amongst the project members before the meeting in Paris took place. This document gives an overview of the differences, the similarities and certain opinions of the examined Member States. Since this document is quite comprehensive, a shortened version has been drawn up (see Annex 11 Comparative analysis of the replies by Juriaan Simonis). The overview is not exhaustive, since some of the answers were not complete or the respondent did not understand the question correctly. The use of different terminology in the English language might also have led to some misunderstanding.

In most of the examined Member States the criminal law is applicable when it comes to a compensation claim. It might play a significant role what law dominates the compensation mechanism (civil, criminal or administrative law), for instance regarding the question with whom lies the onus of proof. Looking for instance at Poland, compensation for wrongful detention has been provided for in the Polish Code of Criminal Procedure. Sweden, on the other hand, has the Act on Compensation for Deprivations of Liberty and other Coercive Measures. For damages that are not covered by this Act, the Tort Liability Act, applies, this is a more a general legislation for liability.

#### *Competent authority*

In the majority of the examined Member States a criminal court decides upon a claim, like in Greece, Poland, Germany, Italy, France and Bulgaria. Some countries have a preliminary step where a claimant can or must try first to claim damages through an administrative body or the public prosecutor's office. We have seen that in the Netherlands the claim will be dealt with at

first by the Prosecutor, if the prosecutor consents with the claim, the case will not have to be brought to court.

#### *Time limits*

There is a wide variety when it comes to time limits to lodge a compensation claim. It starts with 10 days (Greece), two months (Denmark), 3 months (The Netherlands and Spain), 6 months (France), 1 year (Germany and Poland), 2 years (Italy and the Czech Republic), 3 years (Lithuania, Slovakia and Croatia), 6 years (UK), 10 years (Sweden) to no time-limit (Belgium).

#### *Situations that give rise to compensation*

In some Member States a special trial court decision is needed in order to have the right to lodge proceedings. In other Member States compensation is possible when there is a discontinuation of the prosecution.

Acquittal is not always a ground for compensation. In some countries there must have been an 'error in a judicial activity' or 'the facts of the accusation have been disproved', like in Spain. In other member states the claimant must have been granted a final decision of innocence, which is the case in France. However, in countries, like Germany, Denmark or Poland an acquittal in principle gives rise to compensation. There seems to be a universal principle that no compensation is given if the acquitted defendant himself is to blame for his detention, for instance in France, Czech Republic and Spain.

#### *Type of costs*

The type of costs that can be claimed seem to be more or less univocal. Therefore this issue has not been discussed during the meeting. As an example, in the Czech Republic it might concern: lost earnings, actual costs incurred, expenses for legal aid related to the detention, satisfaction/immaterial/moral damages.

#### *Rates for compensation*

Big differences exist regarding the standard rates within the EU. To give an overview:

Greece:	8. 80-29 Euro per diem
Germany:	25 Euro per diem,
Sweden:	±100 Euro per diem for the first six months.
Denmark:	±875 euro for the first day, thereafter ±107 Euro per day
Belgium:	25-100 Euro per diem, but only from the ninth day onwards.
Italy:	235,82 Euro per diem (in case of house arrest 120 Euro)
Netherlands:	80 Euro per diem when detained in a prison, 105 Euro at a police station
UK:	No prescribed daily rate

#### *Factors that play a role in determining the immaterial damages per diem*

To give an impression of some of the examined Member States, for instance the severity of the crime, for which someone is detained, might play a role in Sweden. In France, media attention

might be taken into account, where the Slovakian authorities have replied that the loss of reputation might be a reason for compensation. In Croatia the cumulative length of detention plays a role and in Belgium the ex-suspects criminal record may influence the decision whether or not to compensate.

*Issues that have been brought up for discussion:*

1. Compensation mechanisms are already in place in the examined MS, but are they sufficient?
2. If it is a clear mistake by the issuing state, should this state reimburse the compensation that has been paid by the executing state?
3. Would it be preferable that the person who suffered damage can bring the action in the Member State of residence? The main point seems to be 'where should the arrested person lodge proceedings'.
4. Is it necessary to adapt national compensation mechanism to transnational cases?
5. Should the FD EAW be adjusted, in order to create a new provision so that member states will reimburse the amount of compensation? For instance to establish the duty to ensure fair compensation in EAW cases. Or to establish liability between the issuing Member State and the executing Member State. According to Article 6 of the Charter, the EU has responsibility to ensure that the individual receives a fair compensation.
6. Article 48 of the SIS II regulation EG 1987/2006 may form a basis for reimbursement of compensation.

*Article 48 Liability*

*1. Each Member State shall be liable in accordance with its national law for any damage caused to a person through the use of N.SIS II. This shall also apply to damage caused by the Member State which issued the alert, where the latter entered factually inaccurate data or stored data unlawfully.*

*2. If the Member State against which an action is brought is not the Member State issuing the alert, the latter shall be required to reimburse, on request, the sums paid out as compensation unless the use of the data by the Member State requesting reimbursement infringes this Regulation.*

7. The EU has also intervened in the field of compensation for victims of crimes (Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.) and therefore the EU could intervene in the same manner in the field of compensation for victims of unlawful detention after an EAW arrest.

### Closing remarks and possible products

Jurisprudence shows that compensation claims have been filed for unlawful detention after an EAW arrest in the examined Member States. However, only a few countries that participated in this project, have been able to produce reliable figures on the amount of cases that took place. Subsequently, it is not clear how compensation in transnational cases plays a significant role.

From the replies to the questionnaire it appears that some of the experts have experienced a few cases of compensation in the surrender procedure. Others have searched for national jurisprudence and found applicable proceedings. To raise the awareness with the national

judicial authorities of the EU Member States, it seems desirable to share the outcome of this comparative study union-wide.

The national authorities always strive to further develop their national laws so that it is efficient and just. In order to determine the ideal legal provisions and legal procedures we can draw from the laws of other countries, in both positive and negative sense. Comparative law seems to be a very effective means to constantly improve our own law and the judicial cooperation between countries. The participants to the regional meeting have given their vision on the ideal comparative mechanism in EAW cases.

At the end of the regional meeting the delegates have talked about the possible products that might be evolved from this study. A draft document with the overview per Member State of the practical information of the compensation mechanism after an EAW arrest has been discussed (for the draft, see Annex 12). The partners in this project agreed that such a document would supply useful information that is not available anywhere else. If the EJM Secretariat is willing to support this initiative the EJM contact points could further develop this tool to make it more user-friendly and to complete it with the information on all EU Member States.

Another standard form has been composed that could be used to inform the issuing Member State on the decision on a compensation claim in the executing Member State (see Annex 13). Finally, some of the delegates have expressed their intention to write an article on the compensation mechanism for both academic as judicial practice purposes.

#### List of Annexes

1. List of project members
2. Questionnaire on Compensation
3. Program of the Regional Meeting
4. Attendance register
5. PPP J. Ettenhofer, Germany
6. PPP F. Ruiz, Spain
7. PPP C. Guillet and C. Fabre, France
8. PPP F. Molenkamp and U. Weitzel, the Netherlands
9. PPP H. Sorensen, Denmark
10. PPP of the evaluation of the replies to the Questionnaire, L. Lunshof, the Netherlands
11. Comparative analysis of the replies to the Questionnaire, J. Simonis, the Netherlands
12. Practical Information of the compensation mechanism in the Member States
13. Standard Form to inform the issuing MS