Compensation for Unjustified Detention and the European Arrest Warrant

Florentino-Gregorio Ruiz Yamuza

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ABSTRACT

This article sheds light on the compensation for unjustified detention that occurred while carrying out the European Arrest Warrant. First, the article exposes the reality of the lack of regulation of this matter and the necessity of having a normative reference at the level of the European Union. Second, it highlights the relationship between compensation and the fundamental rights of the detained person and therefore with the provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Third, it also outlines the frequently occurring difficulty of establishing the unjust or arbitrary nature of detention, especially when it comes to the enforcement of an extradition request. Fourth, the article describes some of the problems related to determining the Member State that should assume the compensation and reflects on the appropriate compensation procedure.

AUTHOR

Florentino-Gregorio Ruiz Yamuza

Senior Judge; Member of the Spanish Judicial Network for International Cooperation (REJUE), Criminal Division Appeal Court of Huelva (Spain)

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I. Compensation for Undue Detention – an Unsolved Problem

In the discussion on the EU's surrender regime – the Framework Decision on the European Arrest Warrant (hereinafter FD EAW) –, compensation in cases of undue detention as a consequence of the execution of an extradition request has not yet raised much interest or been considered a problematic issue).[1] Official documents have not dealt with this issue to a great extent. References and studies have limited themselves to stating that the need for compensation is a reality; however, it seems that they merely refer to the national sphere in terms of eliciting an opportune response.[2] Consequently, the problems connected with this type of compensation have not attracted abundant attention in legal literature so far, without prejudice to the existence of some research that I will refer to in this article.

The issue of compensation poses specific challenges. Key concepts deserve a comprehensive approach, and the quest for realistic solutions must be aligned with the scheme of judicial cooperation within the EU's Area of Freedom, Security and Justice, with the doctrine of the European Court of Human Rights (ECtHR), and with the legal traditions of the Member States.[3] Several fundamental questions are still unanswered, such as: [4]

- Should unjust deprivation of liberty only cover situations in which the detained person is finally acquitted, or can other cases be included?
- Should compensation be granted only in cases of pre-trial detention, or is it also possible to grant it if an unjustified deprivation of liberty has occurred as a consequence of an EAW requesting the surrender of a person to serve a prison sentence passed in the issuing Member State?[5]
- Which Member State should be responsible for the compensation – the issuing State or the executing State?
- What procedure should be followed for compensation?

We will approach these questions in three steps: First, identifying the legal bases by which to establish the obligation to compensate (II.); in order to have a complete picture, this analysis will include references to the national level, briefly mentioning the Spanish legal system. Second, determining (within the casuistry of the EAW) when the deprivation of liberty can be tagged as unjustified (III.). Third, considering whether the obligation to compensate should be attributed to the issuing or to the executing Member State and which procedure is deemed appropriate (IV.). The article is rounded off with some concluding remarks, including my personal views on the problem (V.).

II. Legal Context

1. The supranational instruments

The FD EAW does not specifically provide rules on compensation for persons who have suffered unjustified detention in EAW cases. The regulation on expenses in Art. 30 FD EAW could be considered a possible legal basis, but this is debatable because of the wording, which is as follows:

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> 1. Expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State. 2. All other expenses shall be borne by the issuing Member State.

It is doubtful whether compensation for unjustified detention is covered by the concept of expenses. The notion of "expenses" seems instead to relate to costs inherent to the processing of the EAW, and, where appropriate, to the enforcement of the surrender. Thus, in the logic of the FD EAW, expenses are distributed according to where the costs have been incurred.

By contrast, compensation for unjustified detention is an enforceable right of the person who has suffered it and who is entitled to claim compensation from the State. Hence, even though the detention might occur in the executing Member State, it is indirectly related to the proceedings in the issuing State, in other words, the arrest is ultimately ordered on the basis of the requesting decision from the issuing Member State. Another disadvantage of using Art. 30 (1) FD EAW as a possible legal basis concerns situations in which the defendant is acquitted or the case is disposed of after the defendant's surrender to the issuing Member State. In these circumstances, it is not logical to assume responsibility on the part of the executing Member State for compensating the unjustified detention that took place in its territory due to the EAW.

Searching for a legal basis in relevant (implementing) national legislation is also not a successful approach. Although the Spanish Act 23/2014 on Mutual Recognition of Judicial Decisions in Criminal Matters in the EU (hereinafter AMR),[6] for example, contains some references to "compensation", they always refer to the compensation of victims of crime, third parties, or Member States for damages that might have been caused in conjunction with international cooperation (Arts. 15, 25, 173.2 b) and 3, 175.1, and 2 of the AMR). Further, the legal basis for the establishment of a compensation scheme for unjustified detention is found indirectly in supranational fundamental rights law to which the FD EAW, the Spanish AMR, and other acts transposing the FD EAW into the Member States' legal systems refer.[7]

In this context, Art. 6 TEU refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Charter of Fundamental Rights of the European Union (CFREU), and the constitutional traditions of Member States – thus, a closer look at these instruments is necessary in order to find the applicable legal framework for the question of compensation at issue:

- Art. 5 ECHR sets out the right to liberty and security as well as the situations justifying the deprivation of liberty, including extradition detention (para. 1, letter f)). Para. 5 of Art. 5 ECHR explicitly guarantees the right to compensation for persons arrested in contravention of the provision of Art. 5 ECHR.

- Art. 6 CFREU briefly recognizes that "[e]veryone has the right to liberty and security of person." However, scope and limitations of Art. 6 correspond to Art. 5 ECHR,[8] and Art. 52 (3) CFREU clarifies that the corresponding guarantees of the Charter have the same meaning and scope as those laid down in the ECHR. Consequently, the limitations that might legitimately be imposed on the right to liberty and security set out in the Charter cannot exceed those permitted by Art. 5 ECHR.

2. Compensation for unjustified detention in Spain

A proper understanding of compensation in cases of unjustified detention within the scope of the EAW requires, as pointed out above, an analysis both at the supranational and national levels. Considering that compensation mechanisms should be articulated through European Union law from a procedural point of view, the question remains which substantive legislation should be established on this matter. National laws can serve as a model; however, they are heterogenous regarding the viability and amount of compensation. In the following I outline the Spanish compensation system which, due to its originality and complexity, can

illustrate, by way of comparison with other systems, the variety and heterogeneity of the possible regulations.

The Spanish Constitution[9] establishes the basis of the compensation system for losses caused by the activities of public officials and services, making a distinction between damages due to the (mis)functioning of public services (Art. 106.2)[10] and damages caused by judicial error (Art. 121)[11]. The Organic Act on the Judiciary specifies constitutional rules and explicitly addresses compensation for unjustified detention in its Art. 294:[12]

> 1. Individuals who have been under preventive imprisonment[13] and are subsequently absolved from the alleged charge (due to the non-existence of the fact they were accused to have committed) or if a non-suit writ has been issued with regard to those criminal proceedings may claim compensation, provided that they have sustained any damages therefrom. 2. Compensation will be determined considering the time they were remanded in custody and in view of the personal and family consequences…

The scope of compensation under this precept is doubly restricted: first, it is limited to pre-trial detention situations; second, it is limited to those cases in which it cannot be proved that the actual event constituting a crime has occurred (non-existence of the fact). These limitations show that tackling compensation issues in the context of the EAW is very difficult, given that compensation rules differ from one Member State to another.[14]

However, the Spanish Constitutional Court and the Spanish Supreme Court developed a broader interpretation of this concept of compensation in Spanish law after and in light of several ECtHR judgments against Spain.[15] Accordingly, the principle of presumption of innocence should not be undermined by a legal framework (and case law) making compensation dependent on a previous decision not to prosecute or stop criminal proceedings or acquitting the accused person on the basis of the non-existence of the fact. There should be no qualitative difference between the acquittal or dismissal of a case on the grounds of insufficient evidence of the defendant's participation in an ontologically existing fact and in those situations in which the commission of the crime itself cannot be proved.[16]

In my view, this broader interpretation of Art. 294 by the highest Spanish courts is correct. In principle, any person deprived of his/her liberty in criminal proceedings should be compensated for the detention suffered if the case ends with an acquittal or a decision of dismissal. When the person's arrest takes place, he/she must be considered innocent (due to the legal presumption enshrined in Art. 6(2) ECHR, Art. 48(1) CFREU, and Art. 24.2 of the Spanish Constitution). In other words, considering that after the proceedings no guilt has been proven, the defendant had to be presumed innocent *before* the criminal proceedings were initiated and still has to be presumed innocent *after* the criminal case has been closed. Consequently, we can establish that an innocent person (a legal presumption that remains intact after the closing of the criminal proceedings) who has suffered imprisonment has the enforceable right to claim compensation.

This excursus in the Spanish compensation scheme shows that the diverging Member States' legislation on this matter can be aligned. In the Spanish case, jurisprudence overcomes the strict wording of the law and Spanish courts not only aligned their case law to the one of the ECtHR, but also bring the Spanish legal situation closer to other EU Member States. We can reasonably expect that this new case law forms the basis for smoother cross-border cooperation between Spain and other Member States in cases of unjustified detention within the framework of the EAW. This brings us to the next problematic issue, i.e. how the lawfulness of detention is assessed.

III. Assessing the Lawfulness of Detention

1. The ECtHR's case law

A prerequisite to determine the justification of compensation is the (un)lawfulness of detention. The assessment of this issue essentially necessitates a closer look at the ECHR. The ECHR provides a supranational model for national legislations . An analysis of the ECtHR's case law shows that the legitimacy of the deprivation of liberty can be affected by numerous factors, e.g. the excessive and disproportionate duration of deprivation of liberty, the lack of detailed records on the reasons for or place of detention, the lack of effective judicial control of the deprivation of liberty, and the *a priori* impracticality of deprivation of liberty[17] – an issue that particularly concerns extradition.[18]

Moreover, equating unjust detention with a deprivation of liberty followed by an acquittal or dismissal of the case might become inaccurate, depending on a series of concurrent factors. Detention might be regarded as unjust in proceedings in which the defendant is ultimately acquitted or in which the case ends with a final dismissal, but these are not exhaustive hypotheses. If we assume that the acquittal of the defendant or the dismissal of the case are conditions for compensation, in extradition cases, it would invariably be the issuing Member State that should assume the compensation, once the procedure has been concluded. Such a conclusion is also consistent if one compares this situation with one that would apply when compensating those who have suffered pre-trial detention in national proceedings.

In principle, the detention has to fulfil at least one of the justification grounds listed in Art. 5 ECHR in order to be deemed fully legal. It should be recalled in this regard, that, despite their closeness in meaning, unjustified and unlawful detention are not the same thing, even though the terms might overlap and be used interchangeably.[19] At least from a theoretical point of view, they need to be distinguished, since nuances exist. When the Oxford Dictionary defines "unlawful" as "not conforming to, permitted by, or recognized by law or rules," its meaning is very close to that of illegal.[20] By contrast, the term "unjustified" is defined as "not shown to be right or reasonable"[21] or "not justified; not demonstrably correct or judicious; not warranted or appropriate."[22] In *extradition* cases, this distinction seems to be pertinent, and it seems that it is the guiding principle in the ECtHR's case law, particularly on Art. 5(1)(f) ECHR:[23]

In several judgements, the ECtHR has stated the following:

- Lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition "does not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing. In this respect, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that 'action is being taken with a view to deportation or extradition'. It is therefore immaterial, for the purposes of its application, whether the underlying decision to expel can be justified under national or Convention law."[24]

- The term "action taken" is interpreted broadly in the sense that detention might be justified "…by enquiries from the competent authorities, even if a formal request or an order of extradition has not been issued, given that such enquires may be considered 'actions' taken in the sense of the provision."[25]

- The time element is considered to be of utmost importance. Accordingly, any deprivation of liberty is justified only as long as extradition proceedings are in progress. The ECtHR stated in this context: "If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f)."[26]

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- Consistency with the overall purpose of Art. 5 ECHR is key for the ECtHR as the means by which the Court links justification and lawfulness of detention in order to avoid arbitrary detention. Hence, in order to protect the individual against arbitrariness, deprivation of liberty must be "... closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued."[27]

- Lastly, the ECHR does not constrain or elaborate provisions concerning the circumstances in which extradition might be granted or regarding the extradition procedure; consequently, even atypical extradition might comply with the ECHR.[28]

2. The particular case of the Framework Decision on the European Arrest Warrant

The FD EAW operates according to the following rules: The requesting (issuing) Member State issues the EAW, generally in the form of an alert for the requested person entered into the Schengen Information System (SIS)[29]. Once the person sought is found in the territory of the requested (executing) Member State, the judicial authorities of both Member States cooperate to determine whether the surrender is feasible and coordinate the extradition proceedings. As a result, they apply different sets of rules: the national act of each having transposed the FD EAW, the FD EAW itself, and flanking frameworks, such as the CFREU, ECHR, and the national constitutions (see also above II.). In addition, national jurisprudence as well as the CJEU's and ECtHR's case law must be taken into account. Each particular situation requires close examination in order to conclude whether unjustified or unlawful detention existed and which Member State (the issuing or the executing one) should be deemed liable for such an infringement. Determining the suitability of compensation and the amount to be paid under the applicable law might imply specific challenges, as illustrated by the following:

a) Grounds for refusal

If, in accordance with Arts. 3 or 4 FD EAW, a decision was passed that denied the surrender of the person sought, this very fact should not necessarily lead to the conclusion that the time the person spent in prison or under arrest constitutes unjustified or unlawful detention. The refusal of the requested surrender might have several reasons, and, quite often, assessing the viability of an EAW request takes time. In such a scenario, the deprivation of liberty suffered by the person sought while the extradition request was examined might be entirely lawful and justified or it may have been subject to the concurrent factors analysed supra under III.1. In the specific case of the EAW, we should further distinguish between a refusal on the basis of mandatory refusal grounds (as enshrined in Art. 3 FD EAW) and optional grounds for refusal (pursuant to Arts. 4 and 4a FD EAW).

If the executing judicial authority declares that extradition must be denied because of one of the refusal grounds in Art. 3 FD EAW, the question arises as to whether there has been an infringement of the rules governing justified and lawful detention pursuant to the supranational and national instruments and case law referred to above. Two scenarios are possible:

First, we can assume that the executing judicial authority carefully verified the circumstances foreseen in Art. 3 FD EAW and has diligently dealt with the extradition request. Accordingly, a warrant was issued following the requirements of the FD and said warrant was processed correctly and adequately. In this case, any hypothetical liability related to the unlawfulness of detention (and the compensation obligation arising from it) can only be established with the issuing Member State authority and only if such authority knew of the existence of the circumstances preventing the surrender in advance but still chose to issue the warrant.

Second, and conversely, if the intervention of the executing authority was slow, wrong, or inadequate, possible shared responsibility with the issuing Member State authority (in one of the cases I have just described above), can be determined. If the request was admissible, even the sole responsibility of the executing Member State may be established.

As for the optional grounds for refusal (Arts. 4 and 4a FD EAW), it is even more cumbersome to determine the hypothetical liability of the issuing Member State, given that there is a degree of uncertainty inherent in the listed refusal grounds. We should also bear in mind that, even though a Member State may have refused the extradition, another Member State may re-evaluate the EAW anew if, for instance, the same EAW is reissued and the same sought person has travelled to another Member State. In other words, the initial denial of the EAW by a Member State does not prevent the surrender from being affirmed by the executing authorities of a third Member State. In these cases, a possible solution for compensation might be found in Art. 26(1) FD EAW. According to this article, the time spent in detention in the executing Member State shall be deducted from the total detention period to be served in the issuing Member State as a result of a possible custodial sentence passed there. Hence, in a situation where there has first been a possibly unjustified detention period followed by a fully legal detention period that ultimately led to the surrender of the requested person, the most suitable solution would probably be the deduction of the total periods of detention suffered, i.e. both the justified and unjustified detention periods.

b) Fundamental rights as a refusal ground

A refusal of the EAW due to fundamental rights infringements may lead to problems analogous to those involving refusals on the basis of Arts. 3, 4, and 4a FD EAW. Likewise, proportionality-related issues may also give rise to problems.

Although not explicitly stipulated in the FD EAW as a refusal ground, the CJEU has recognized that the executing Member States may refrain from executing an EAW due to fundamental rights concerns.[30] Although the CJEU requires the executing authority to comply with several steps before it takes the granting decision, the executing authority of a Member State is entitled to deny surrender, having a certain margin of appreciation. Similar to the explicitly laid down refusal grounds described under a), also here a Member State may grant extradition in the future even though it had previously been denied by another Member State. It is still unclear whether refusals due to fundamental rights issues can result in compensation for the time spent in arrest while decisions on extradition had to be prepared and taken. Furthermore, the question again arises as to which Member State should assume the compensation.

It can be argued that the issuing Member State should be obliged to compensate, since the executing Member State refusing the surrender had to intervene in order to preserve fundamental rights. Nevertheless, this solution would create a disparity with the situation of other detainees in the issuing Member State who endure similar fundamental rights infringements (e.g. poor prison conditions) but are not entitled to compensation.

c) Other issues

Errors related to routine procedural matters, e.g. mistakes made in identifying the sought person, detentions and arrests of the wrong person for several days, and too lengthy or slow extradition proceedings, demand careful assessments to conclude which authority in which Member State was responsible for them. Another point in the discussion on paying compensation relates to situations in which the surrender is to be made subject to conditions (Art. 4a (1)(d), and Art. 5 FD EAW) but the required guarantees are not given by the issuing Member State in the end. Also, here, the time spent in prison in the executing Member State could equally be considered unjustified detention, even if the deprivation of liberty was initially legitimate.

IV. Member State to Assume the Obligation to Compensate and Compensation Procedure

The examples given under III.2 have shown that, in extradition cases, diverse situations exist in which unjustified detention may occur. In extradition cases, the proceedings are different from purely national criminal proceedings. In proceedings at the national level, the closure of the proceedings without a conviction occurs within a context that leaves less room for legal uncertainty, since the closure without conviction does not depend on future events, such as the decision of another State. This is different when detention is part of EAW/extradition proceedings: if a Member State executing an EAW refuses the surrender, this decision does not imply final procedural closure, since the person concerned can be subsequently handed over to the issuing State, on the basis of the same facts, by another Member State or by a third State outside the European Union. Theoretically, the likelihood of reopening the case could impede a possible compensation for unjustified detention. Moreover, unjustified detention might happen again after a conviction in the issuing Member State. This is very unlikely to happen in national cases (although it is possible, for instance, that imprisonment after the penalty imposed is statute-barred), but it could occur in extradition proceedings when two States are involved and the executing Member State considers the surrender to be denied by applying the grounds for refusal laid down in the FD EAW (Arts.3, 4, 4a 1. a), b) or c)). I propose a system that obviates a debate each time a decision needs to be taken as to which Member State should be responsible for compensation for unjustified detention in EAW cases. This system could be organised as follows:[31]

- The compensation process would consist of two phases: first, determining the existence of unjustified detention and, second, setting and paying the amount to be compensated. I advocate that both determining the existence of unjustified detention and determining the amount to be paid should be carried out in the Member State where the detention has been verified. This Member State should take the decision by applying its own law. It should be taken regardless of the final grounds substantiating the conclusion that the detention was unjustified. Such an approach would ensure legal certainty, since the person concerned can rest assured that the Member State in which the detention occurred bears responsibility for the compensation, regardless of the reasons for the illegality of the arrest and where they originated (in the State of detention or another State).

- Compensation should normally be borne by the executing Member State in whose territory the initial deprivation of liberty occurred and should cover the period spent under arrest until the moment of effective surrender to the issuing State. If an unjustified arrest continues after surrender, the obligation to compensate should shift to the requesting State from that moment on. This is a neat and simple solution, and it would also apply if the unjustified detention was initially caused by an error or a deficiency in the executing State (the wrong person was surrendered or the executing authority failed to apply a refusal ground, e.g. time limitation).

- Conferring the obligation to compensate to the State in which the deprivation of liberty occurred could be accompanied by an indemnity clause covering the hypothesis that the arrest lacked justification, namely that it was not caused in the State in which the deprivation of liberty had taken place. On the one hand, this approach could indeed lead to litigation, taking into consideration the different opinions Member States may have on the issue of compensation. On the other hand, the approach would be in line with compensation schemes in other cooperation instruments that stipulate, for instance, that the EU Member States can share both the costs and benefits derived from international judicial cooperation.[32]

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- In cases in which a first decision denies extradition and subsequent surrender of the same person by another Member State in another EAW proceeding occurs in relation to the same facts, the concept of Art. 26 FD EAW should be preferentially applied (see above III.2a). Instead of compensating the unjustified deprivation of liberty that occurred due to the first EAW, the detention time should be deducted in the subsequent proceedings that ultimately led to the surrender.

- Considering the possible issuance of successive EAWs for the same offence and given what we have just concluded, the compensation procedure should begin once a final decision has been reached in the issuing State acquitting the requested person or dismissing the case.

- Depending on which Member State might be found liable for the losses caused by the unjustified detention (issuing or executing State or even both of them), the compensation procedure would need to be different. In addition, we must consider situations in which the compensation for unjustified detention might be claimed for a Member State other than that of the residence of the affected person, e.g. in the event that the person who suffered unjustified detention did not claim compensation when he/she was in the State in which the arrest occurred and decides to claim it once he/she is back in his/her home country.[33] Here, a scheme similar to the scheme to compensate victims of crime in cross-border situations, as set out in Directive 2004/80/EC,[34] could be adopted. This Directive ensures that each EU country has in place a national scheme that guarantees appropriate State compensation to victims of intentional violent crimes. It also ensures that compensation is easily accessible, regardless of where in the EU a person becomes the victim of a crime. It could even be considered that the Member State of the nationality/residence of the person who has suffered unjustified detention take over the compensation process and the pertinent award payment, claiming reimbursement from the Member State considered ultimately responsible for compensation.

V. Concluding Remarks

The compensation of unlawful or unjustified deprivation of liberty in cross-border cases involving the European Arrest Warrant might not be at the top of the agenda of problems to do with the mutual recognition instrument. It deserves deeper reflection, however, and demands a univocal approach at the European Union level. In synthesis of the ideas presented in this article, the following recommendations are relevant:

- The EU should establish a unitary legal framework that sets out compensation for unjustified detention in EAW cases and the procedure to obtain such compensation.

- This legal framework should define the cases in which compensation for unjustified deprivation of liberty can be obtained as a consequence of the execution of an EAW.

- The framework should guarantee that any person who has suffered an unjustified deprivation of liberty has access to a compensation system. This system must harmonize the situations giving raise to compensation, determine which Member State would be *a priori* responsible for compensation, and define a procedural pattern of claim, when it comes to the operation of EAWs.

- The system must legally clarify whether compensation in transnational cases should only cover cases in which there has been an acquittal or dismissal concerning the arrested person or whether it should be extended to other scenarios where there has been a deprivation of liberty not followed by a conviction.

- In addition, a debate about a possible procedural model that would meet the identified needs must be launched.

The lack of regulation in this matter should be remedied as quickly as possible in order to provide sound legal footing – one on which the victims of unlawful detention can stand.

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1. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), *O.J.* L 190, 18 July 2002, 1.↩
2. Cf., for instance, the European Parliament Report on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI) which does not mention this issue The report is available at: <https://www.europarl.europa.eu/doceo/document/A-9-2020-0248_EN.pdf>. Similarly, the European Commission Handbook on how to issue and execute a European Arrest Warrant (*O.J.* C 335, 6 October 2017, 1), has only one reference to compensation at p. 36: "Following the surrender of the requested person, the issuing Member State must take into account the periods of detention that have resulted from the execution of the EAW. All of these periods must be deduced from the total period of the custodial sentence or detention to be served in the issuing Member State (Article 26 of the Framework Decision on EAW). If the person is acquitted, provisions of the issuing Member State on compensation for damages may apply." The study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, *Criminal procedural laws across the European Union –A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, deals with the matter to some extent, dedicating its section 6 (pp. 123 et seq.) to the different national compensation schemes for the case of unjustified detention and its relationship with international judicial cooperation. The study is available at: <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604977>. All hyperlinks referred in this note and the subsequent notes were accessed on 26 November 2021.↩
3. On the need for regulation in this field, see the European Parliamentary Research Service paper "*Revising the European Arrest Warrant. European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report (Rapporteur: Baroness Ludford MEP)",* <>. See also V. Costa Ramos, "Future procedural rights in the context of the European Arrest Warrant, pre-trial detention and detention", <https://carlospintodeabreu.com/wp-content/uploads/2020/10/Costa-Ramos-The-next-steps-Detention-and-EAW-V3.pdf>.↩
4. My personal interest in this matter started when I had the pleasure of participating in the European Judicial Network project "Compensation for unjustified detention in EAW-cases", which ended in September 2017: <https://www.ejn-crimjust.europa.eu/ejnupload/RM17/NL_Report_Regional_2017.pdf>.↩
5. On broaching the need for regulation on pre-trial detention at the EU level, see E. Baker, T. Harkin, V. Mitsilegas, and N. Persak, "The Need for and Possible Content of EU Pre-trial Detention Rules", (2020) *eucrim,* 221; A. Martufi and C. Peristeridou, "Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework", (2020) 3 *European Papers*, 1477.↩
6. Act 23/2014 of 20 November 2014, on Mutual Recognition of Judicial Decisions in Criminal Matters in the European Union, *Official Gazette (BOE),* 21 November 2014. The English version of this Act (translated by the Spanish Ministry of Justice) is available at: <https://ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%2023%20of%202014.pdf>.↩
7. Cf. Recital 12 and. Art. 1(3) FD EAW. By the same token, Art. 3 AMR, entitled "Respect for fundamental rights and liberties", reads: "This Act shall be applied respecting the fundamental rights and liberties and the principles set forth in the Spanish Constitution, in Article 6 of the European Union Treaty and the Charter of Fundamental Rights of the European Union, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe of 4 November 1950."↩
8. Explanations relating to the Charter of Fundamental Rights, *O.J.* C 303, 14 December 2007, 2.↩
9. Constitution of 31 October 1978, *Official Gazette*, 29 December 1978. Its English version is available at: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>.↩
10. The wording is as follows: "…Private individuals shall, under the terms established by law, be entitled to compensation for any loss that they may suffer to their property or rights, except in cases of force majeure, whenever such loss is the result of the operation of public services."↩
11. This right reads as follows: "…as well as those arising from irregularities in the administration of justice shall give rise to a right to compensation by the State, in accordance with the law." ↩
12. Organic Act 6/1985 of 1 July on the Judiciary, *Official Gazette*, 2 July 1985. An English translation of the Organic Act is available at: <https://www.poderjudicial.es/cgpj/es/Temas/Compendio-de-Derecho-Judicial/Leyes/Ley-Organica-6-1985--de-1-de-julio--del-Poder-Judicial>.↩
13. Literally translated from "prisión preventiva" and can be understood as pre-trial detention.↩
14. The Spanish model is complex, since the compensation foreseen for unjustified detention and for judicial error are more restrictive than the general scheme of compensation for losses stemming from the functioning of public services. Art. 106.2 of the Spanish Constitution, and Act 40/2015 of 1st of October on the Legal Regime of the Public Sector (*Official Gazette*, 2 October 2015, <https://www.boe.es/eli/es/l/2015/10/01/40>) contemplate general coverage for losses connected with the functioning of public services, disregarding any degree of negligence that may have been produced: "Individuals have the right to be compensated by the relevant Public Administrations for any loss suffered in their property and rights, provided that such loss is a consequence of normal or abnormal functioning of the public services except in cases of force majeure or damages the individual has the legal duty to tolerate in accordance with the Law." Conversely, Arts. 293 and 294 of the Organic Act on the Judiciary make compensation in cases of judicial error and for unjustified detention dependent on a sort of malfunctioning of the justice system.↩
15. ECtHR, 25 April 2006, *Puig Panella v. Spain,* Appl. no. 1483/02; ECtHR, 13 July 2010, *Tendam v. Spain,* Appl. no. 25720/05; ECtHR, 16 February 2016, *Vlieeland Boddy and Marcelo Lanni v. Spain*, Appl. no. 53465/11.↩
16. Spanish Constitutional Court, judgments 8/2017, 19 January 2017, ECLI:ES:TC:2017:8; 10/2017, 30 January 2017, ECLI:ES:TC:2017:10, and 85/19, 19 June 2019, ECLI:ES:TC:2019:85; Spanish Supreme Court, Judicial Review Chamber, decision 1348/2019, 10 October 2019, ECLI:ES:TS:2019:3121.↩
17. ECtHR, 12 June 2008, *Shchebet v. Russia,* Appl. no. 16074/07; ECtHR, 2 October 2008, *Rusu v. Austria,* Appl. no. 34082/02; ECtHR, 12 February 2009, *Nolan and K. v. Russia,* Appl. no. 2512/04; ECtHR, 7 June 2007, *Garabayev v. Russia*, Appl.no. 38411/02. See also the ECtHR judgments cited in n. 15.↩

18. The ECtHR "*Guide to Article 5 of the Convention*" also offers detailed explanations on how to construe the "lawfulness of detention under Article 5 § 1" (cf. part II of the guide) and "authorized deprivations of liberty under Article 5 § 1" (part III). The guide is available at <http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf>.↩
19. The United Nations Human Rights Council resorts to the term "arbitrary" as something being more than merely against the law, interpreting the term widely to include such elements as inappropriateness and injustice (See, among others, *A v. Australia*, Communication No. 560/1993; reaffirmed in *Danyal Shafiq v. Australia*, Communication No. 1324/2004). The notion of arbitrariness is also used by the ECtHR: ECtHR, 29 January 2008, *Saadi v. United Kingdom*, Appl. no. 13229/03; ECtHR, 26 April 2007, *Gebremedhin v. France,* Appl. no. 25389/05; ECtHR, 10 May 2007, *John v. Greece,* Appl no. 199/05).↩
20. <https://en.oxforddictionaries.com/definition/unlawful>. Cf. also the entry in Merriam Webster Legal Dictionary: "Not lawful, illegal" (https://www.merriam-webster.com/dictionary/unlawful#legalDictionary).↩
21. Oxford Dictionary, *op. cit.* (n. 20).↩
22. Merriam Webster Dictionary, *op. cit.* (n. 20).↩
23. The following summarises the ECtHR's *Guide to Article 5 of the Convention, op. cit.* (n. 18), paras. 146 et seq.↩
24. ECtHR, 15 November 1996*, Chahal v. the United Kingdom,* Appl. 22414/93, para. 112*;* ECtHR,5 February 2002, *Čonka v. Belgium,* Appl, 51564/99, para. 38*;* ECtHR, 11October 2007, *Nasrulloyev v. Russia*, Appl 656/06, para. 69; ECtHR, 23 October 2008, *Soldatenko v. Ukraine,* Appl. 2440/07, para. 109.↩
25. Commission decision of 9 December 1980, *X. v. Switzerland*, Appl. no. 9012/80.↩
26. ECtHR, 19 February 2009*, A. and Others v. the United Kingdom,* Appl. 3455/05, para. 164; ECtHR, 12 February 2003, *Amie and Others v. Bulgaria,* Appl. 58149/08, para. 72.↩
27. *Ibid.* See also ECtHR, 20 December 2011, *Yoh-Ekale Mwanje v. Belgium*, Appl. 10486/10, paras. 117-19 with further references.↩
28. ECtHR, 12 March 2013, *Öcalan v. Turkey*, Appl. 46221/99, para. 86; ECtHR, 21 June 2011, *Adamov v. Switzerland*, Appl. 3052/06, para. 57.↩
29. Cf. Arts. 9 and 10 FD EAW.↩
30. CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*; CJEU, 25 July 2018, Case C-220/18 PPU, *ML*; CJEU, 25 July 2018, case C-216/18 PPU, *LM*; CJEU, 15 October 2019, Case C-128/18, *Dorobantu*.↩
31. A EU wide problem requires unified solutions a the Union level combining a common framework plus the application of national legislations, see H. Sørensen, Mutual recognition and the right to damages for criminal investigations, (2015) 5 *European Criminal Law Review*, 194-208.↩
32. See Art. 13 of Council Framework Decision 2005/214/JHA of 24 February 2005 on application of the principle of mutual recognition to financial penalties, *O.J.* L 76, 22 March 2005, 16: "Monies obtained from the enforcement of decisions shall accrue to the executing State unless otherwise agreed between the issuing and the executing State, in particular in the cases referred to in Article 1(b)(ii)."↩
33. For the peculiarities of having two Member States involved in the compensation process, see also H. Sørensen, "International and European Approaches to Extraterritorial Liability for Violation of Fundamental Rights in International Criminal Law", in: W. Benedek, F. Benoit-Rommer, W. Karl, and M. Ketterman (eds.), *European Yearbook on Human Rights,* 2013, 1.↩
34. Council Directive 2004/80/EC of 29 April 2004 relating to compensation of crime victims, *O.J.* L 261, 6 August 2004, 15.↩

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