International & European Criminal Law Observatory

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EU as a Global Actor: Judicial Cooperation Instruments

Stefano Busillo

Ph.D Candidate; Honorary Fellow in EU Law and International and European Criminal Law, University of Salerno

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TRANSNATIONAL CRIME AND EU LAW:
towards Global Action against Cross-border Threats to common security, rule of law, and human rights

Summary

Introduction

Mutual legal assistance is a form of **cooperation** between **different countries** for the purpose of **collecting and exchanging** information by the **judicial authorities** thereto. Such assistance can even resort to the **surrender of an accused or a convicted person**. Hence, a wide array of forms of cooperation surfaced in this field.

Now, as broadly understood, judicial cooperation instruments in the **European region** are **divided** in '***classic tools***' (legacy tools) and '***new tools***'.

The **classic tools**, e.g. extradition, are the '**legacy**' of the **customary practices between States.**

They are **widely accepted and applied** and, for the most part, **rely on bilateral and multilateral treaties** to be implemented.

They also may present **procedures** that are **complex** to a certain degree, at times **even involving the political will** of the requested States.

The **new tools**, e.g. the European Arrest Warrant, **instead** have been developed **quite recently** and generally refer to the **EU legal framework**. **Not** needing an ***ad hoc*** **treaty**, they are **eventually extended** to the EU Member **States**. These tools are developed under **Art. 82 TFEU** and have **speed** and **effectiveness** as their main traits.

As the object of the hereby focus, the most prominent ones among these will be analysed and discussed in this presentation.

Part I
European Arrest Warrant

1. Background

The **surrender** of an accused or a convicted person was, under **customary practice**, bound to '**extradition**', a tool based on **national provisions**, hence with a **fragmented framework** of application.

Historically, the **main issues** with extradition were the **length and complexity** of the procedures, with actual **administrative-political phases within.**

In **Italy**, for instance, the **Ministry of Justice** is involved in both active and passive extradition.

2. Framework Decision 2002/584/JHA

The EAW is a **simplified cross-border judicial surrender procedure** for the purpose of **prosecution or executing a custodial sentence or detention order**.

The **Framework Decision 2002/584/JHA on EAW** has been in force since 1 January 2004 **in all Member States**. The **purpose** of the EAW is to ensure that **open borders and free movement** in the Union are **not exploited** by those seeking to evade justice.

It is **regarded as the most successful instrument** of judicial cooperation in criminal matters in the Union so far.

3. How Does It Work?

Who? EAWs are issued by a national judicial authority (judge, prosecutor, other independent authorities, etc.)

For? EAWs are meant to prosecute a person when the offence for which the person is being prosecuted is punishable by the law of the issuing Member State by a custodial sentence or a detention order for a period of **at least 12 months** (as max); or the execution of a custodial sentence or detention order when the sentence passed is of at least 4 months (Art. 2).

An **EAW issued** by one EU country's judicial authority is **valid in the entire territory of the EU**. The mechanism is based on the principle of **mutual recognition** and therefore operates via **direct contact between judicial authorities**.

3.1 Time Limits

Within 10 days, when the requested **person consents** to his or her surrender

Otherwise, the final decision on the execution of the EAW should be taken within a period of **60 days** after the arrest of the requested person (Art. 17).

What if there's no decision at all? **When no refusal** is issued, the requested person must be surrendered **as soon as possible on a date agreed** between the authorities concerned, and **no later than 10 days** after the final decision on the execution of the EAW.

3.2 Double Criminality Check

As **general rule**, the surrender may be subject to the **condition** that **the conduct** for which the EAW has been issued **also constitutes an offence** in the executing Member State.

However, as **another important EAW's advantage** compared to extradition proceedings, there is **no double criminality check for 32 categories of offences**. It is **sufficient** that the **conduct** (or alleged conduct) of the requested person **comes within the scope of any of these offences**, as defined by the law of the issuing Member State, and is punishable by a **maximum sentence of at least three years** of imprisonment in that State.

4. Limitations: Guarantees and Refusal

The **country that executes** the EAW **may require guarantees** for which:

a) if the offence on the basis of which the EAW has been issued is punishable by **custodial life sentence or life-time detention order**, the **requested person** will have the **right to ask for review after a certain period**,

b) the **requested person**, being a **national** or **resident** of the **executing state**, is **returned there to serve** there the custodial **sentence** or detention order passed in the issuing Member State.

The **executing judicial authority eventually refuses** to execute the EAW **only if** one of the mandatory or optional ground for refusal applies.

Mandatory grounds:

- the offense is covered by amnesty (the executing country could have prosecuted, and the offence is covered by an amnesty in that country).
- the person has already been judged for the same offence (*ne bis in idem*);
- the person is a minor (the person has not reached the age of criminal responsibility in the executing country).

Optional grounds, **when transposed by Member States**:

- lack of double criminality for offences other than the 32 listed in the Framework Decision on EAW;
- there is a pending criminal procedure in the executing country for the same acts;
- statute of limitations applies;
- the person has been judged *in absentia*, without respect of certain conditions.

An EAW should always be **proportionate** to its aim. The issuing judicial authorities should thus carry out a **'proportionality check' before** deciding whether or not to issue an EAW → Art. 52(1) Charter of Nice.

Considering the severe consequences that the execution of an EAW has on the requested person's liberty and the restrictions of free movement, the issuing judicial authorities should **consider all relevant factors** in order to determine whether issuing an EAW is justified (proportional). In particular, the following factors should be taken into account:

a) the **seriousness of the offence** (for example, the harm or danger it has caused);
b) the **probable penalty** imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);
c) the **likelihood of detention** of the person in the issuing Member State after surrender;
d) the **interests of the victims** of the offence.

Part II
European Investigation Order

1. Background & Directive 2014/41/EU

The **European Investigation Order** (EIO) was established by **Directive 2014/41/EU** and was a **major step forward** in judicial cooperation in criminal matters within the EU. In particular, the **EIO supersedes the letter of requests** (**letter rogatory**) which is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are **service of process and taking of evidence**.

The EIO Directive **is valid throughout the EU**, but does **not** apply in **Denmark and Ireland** (unlike the EAW). Again, it is based on **mutual recognition**, which means that the executing authority is, in principle, **obliged to recognise and ensure execution** of the request from the other country.

2. How Does It Work?

Overall, the EIO is

1. a **decision** issued (or validated) by a '**judicial**' authority;
2. within **criminal proceedings**;
3. consisting in **investigative measures of trans-border nature**;
4. aimed at **gathering evidence**;
5. among the **sole Member States bound by the EIO Directive**
6. recognized unless one of the grounds for non-recognition or grounds for postponement exist..

2.1 Scope

The EIO is deliberately **wide ranging** in order to take into account the differing roles of the police and prosecutors in the various Member States.

The gathering or transfer of intelligence can be covered by the order, the search of premises and surveillance activity can also be asked for, as can the transfer of information already in the possession of the police in a country. In short, **any activity that can be carried out lawfully domestically** can be asked for (or asked of).

Indeed, Art. 3 within the Directive states that the EIO covers '*any investigative measure*' with **specific exemptions**.

With the respect to such exemptions, the EIO **does not apply** in cases where **other peculiar provisions apply already**:

- **joint investigation teams** are exempt from the EIO (Art. 3 Directive);
- Art. 40 Convention Implementing the Schengen *Acquis*;
- requests to Ireland and Denmark which should be continued by way of International letters of request;
- any non-EU Member State which should be continued by way of International letters of request;
- **confiscation** unless part of a criminal proceeding;
- **police to police** activity which may include taking statements from willing witnesses.

2.2 Time Limits

In general, **30 days** to make a decision on whether to recognise (accept) the order.

Once the order is **recognised**, the executing authority has **90 days** to carry out the request.

If the action cannot be taken within the 90 days, the local authority must let the **central authority** know it as soon as possible and a **further 30 days** can be **extended.**

2.3 Limitations

EU countries **can refuse** the request on certain grounds. The following **general grounds** for refusal apply to **all measures**:

- immunity or privilege or rules limiting criminal liability relating to freedom of the press
- harm to essential national security interests
- non-criminal procedures
- *ne bis in idem* principle
- extraterritoriality coupled with double criminality
- incompatibility with fundamental rights obligations.

There are **additional grounds** for refusal by **the executing authorities** on **certain measures**:

- lack of double criminality (except for a list of serious offences)
- impossible to execute the measure (investigative measure does not exist or is not available in similar domestic cases, and there is no alternative).

On turn, the **issuing authorities** can only use a EIO if the investigative measure is necessary, proportionate, and allowed in similar domestic cases.

Part III
Joint Investigation Teams

1. Background

In certain cases, the **operational needs** of the authorities involved **are not fully met** by the **traditional channels** of mutual legal assistance **nor** by some of the **new tools**. **Direct cooperation and communication** between authorities is the most efficient method of handling the increased sophistication of organised criminal activities.

Indeed, the **creation of Joint Investigation Teams** (JITs) offer national authorities in different States has become a **flexible framework** that is **relatively quick and easy to establish** and enables the respective authorities to participate in the investigation in a **mutually beneficial way**.

2. JITs within the EU Law

Since the establishment of JITs – under **Art. 13 of the EU MLA Convention (2000) and the Council Framework Decision 2002/465/JHA on Joint Investigation Teams**, respectively – JITs have become widely used by law enforcement officials and public prosecutors in investigating serious crimes with a cross-border dimension throughout the EU.

'By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team'.

[Art. 13, para. 1 EU MLA Convention of 2000]

Regulation (EU) 2023/969 establishes a so-called '***collaboration platform***' to support the functioning of JITs. This dedicated IT platform shall ensure a **secure electronic exchange of info and evidence** as well as **secure electronic communications** between JIT members.

Also, JITs **can be backed up by Eurojust and Europol**, other judicial and law enforcement **agencies, EPPO**, as well as the **JITs Network** (set up in 2005). According to Eurojust's 2022 Annual Report, the number of JITs with Eurojust's involvement was at 265 JITs in 2022.

3. How Does It Work?

- **formal agreement** between what must be **competent authorities** – both **judicial** (judges, prosecutors, investigative judges, etc.) and **law enforcement** – of **two or more States;**
- **terms in accordance** with which a JIT operates **vary from case to case;**
- **led by a member** from the **country** in which it is **based**. In fact, although set-up by means of EU Law, JIT's activities **abide by the law of that country;**
- **legal basis**, **composition**, **purpose** and **location** in which the JIT operates;
- **duration**, typically between 12 and 24 months but can be extended;
- **International nature** of the case;
- **Specific purpose** of the JIT.

4. Clear Advantages

For complex international investigations the benefits of a JIT can be substantial. **Advantages include**:

- the operation is headed by **one clear leader**, securing the best evidence in the participating states;
- to **avoid duplication of work**;
- JIT members have possibility to **share information without formal requite**, and the possibility to request investigative measures between them without the need for letters rogatory;
- to ensure that **tactical decisions are made jointly** so that the investigation in one country does not compromise that of another;
- to be sure that **jurisdictional issues are addressed early on** and appropriate decisions are made regarding trial venue.

NOTE: it is not necessary to have a domestic investigation already started to participate in a JIT.

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Part IV

European Production Order & European Preservation Order

1. Background

Web-based communications have become a **commonplace** across the world. While their economic and social benefit is significant, they can also be misused as tools to **commit or facilitate crimes**. IT services are often the only place where investigators can find leads to determine who committed a crime and obtain evidence that can be used in court.

Given the **borderless nature of internet**, such services can be provided from anywhere in the world and do not necessarily require physical infrastructure, **challenging the classical concept of sovereignty and jurisdiction**.

2. Regulation (EU) 2023/1543

In the Union, Regulation (EU) 2023/1543 **lays down the rules** under which an authority of a Member State, in criminal proceedings, may issue a **European production order or a European preservation order** and thereby **directly require a private service provider**, that is active in the EU and is established in another Member States, to **produce or preserve electronic evidence regardless of the location of the data** (Art. 1).

The issuing of these orders may also be requested by a suspect or an accused person, or by a lawyer on that person's behalf.

3. European Production Order

Pursuant to the Regulation, a judicial authority of a Member State will be entitled to issue a European production order (EPro) to **obtain electronic evidence directly from a service provider** located in another Member State.

In the case of requesting **traffic data or content data**, a judge, a **court** or an **investigating judge** will be a proper issuing authority. If a Member State wanted to obtain **subscriber data or ID data**, a **public prosecutor** would also be **entitled** to issue an EPro. The Member States may define further competent issuing authorities, but in these case the Regulation requires a validation process (Art. 4).

An EPro for obtaining **traffic data or content data** may be issued if **necessary** and **proportionate** to the purpose of criminal proceedings relating to offenses punishable in the issuing State by a custodial sentence of a **maximum of at least three years or** to **specific offenses** referenced in the Regulation. Further, an EPO requires that a **similar order could have been issued under the same conditions in a domestic case**.

In the case of **subscriber data or of ID data**, the same **conditions apply**, but in these cases EPro may be issued **for all offenses** subject to a criminal investigation.

4. European Preservation Order

By way of a European Preservation Order (EPre), **a judge, a court, an investigating judge, a public prosecutor** or – upon validation – **another designated authority** may order that a service provider located in another Member State **preserve electronic evidence for the purposes of a subsequent request for production** (Art. 5).

Such an order may be issued **for all criminal offenses** if **necessary for and proportionate** to the purpose of preventing the removal, deletion or alteration of data with a view to issuing a subsequent request for production of those data and if it could have been issued under the same conditions in a similar domestic case.

These orders may also serve for the **execution of a custodial sentence or a detention order** of at least four months, following criminal proceedings, imposed by a decision that was not rendered *in absentia*, in cases where the person convicted absconded from justice (Art. 6).

In the case of a EPre, the service provider must **preserve the requested data without undue delay.** The **obligation** to preserve the data **will cease after 60 days**, **unless** the issuing authority **confirms** that **a subsequent request** for production has been issued. Also, during that 60-day period, the issuing authority may **extend the duration of the initial obligation** to preserve the data by an additional **30-day period** if **necessary** to allow for the issuing of a subsequent request for production (Art. 11).

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