Table of Contents

1. Introduction

André Klip and Gaetano Ancona

1.1. Reasons for the research project

Judicial authorities considering a request for judicial cooperation in criminal matters must ensure a coordinated application of legal instruments. This is essential for achieving an effective and coherent application of such instruments, which includes the proportionality of the requested assistance and offering the suspect effective judicial protection. This is what the Court of Justice of the EU (CJEU) requires Member States to do in its most recent judgements. In addition, the Court has stated that judicial cooperation requires a *coordinated application of the legal instruments* (e.g. CJEU Joined Cases C-566/19 and C-626/19, par. 43). There are indications that such a coordinated application, or *effective and coherent application of EU legal instruments* is in practice not always applied in some situations and is impossible in other cases. The aim of the project Mutual Recognition 2.0 (https://mutualrecognitionnextlevel.eu/) is to identify what stands in the way of an effective and coherent application of the legal instruments on cooperation in criminal matters. This project is a follow-up of two earlier projects led by the Amsterdam District Court and Maastricht University: The *InAbsentiEAW* research project (https://www.inabsentieaw.eu/), which led to the publication of *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series No. 12,[1] and the *ImprovEAW* project (https://improveaw.eu/), which was concluded by the publication *Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines*, Maastricht Law Series No. 27,[2] after several of the country reports had been published: *European Arrest Warrant Practice in Greece, the Netherlands and Poland*.[3]

At present, EU law provides the national authorities of the Member States with a wide range of instruments concerning judicial cooperation in criminal matters: the European Investigation Order (EIO), the European Surveillance Order (ESO), the European Arrest Warrant (EAW), mutual recognition of custodial sentences (FD 2008/909), mutual recognition of probation decisions and alternative sanctions (FD 2008/947) and the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the EU. Except for the EU Convention, all of these EU instruments are based on the principle of mutual recognition, which in turn is based on the principle of mutual trust. The 1972 Council of Europe (CoE) Convention on the

1 The report, as well as all other documents of the project are also accessible at https://www.inabsentieaw.eu.

2 The report, as well as all other documents of the project are also accessible at https://improveaw.eu/.

3 Maastricht Law Series No. 23.

Transfer of Proceedings in Criminal Matters and the 1959 CoE Convention on Mutual Legal Assistance complete the network. As a whole, these instruments cover criminal proceedings from the start of the investigation stage through the trial stage to the sentence enforcement stage. During the proceedings, national authorities (such as public prosecutors or courts) may face the need for judicial cooperation with the authorities of another Member State and, in such cases, may have to choose between the application of two or more instruments. This raises the issue of effective and coherent application of the instruments mentioned above.

The concept 'effective and coherent application' was elaborated in the document *MR2.0: some preliminary explorations*, which served as the starting point of the research[4] and constitutes Chapter 2 of this report. That document identified four dimensions of the concept of coherence and provided working definitions of 'coherence' and 'effectiveness'. Only at a later stage, the concept of 'efficiency' was incorporated (see Chapter 7.1). The four dimensions of 'coherence' are comprehensiveness, completeness, consistency and proportionality. The concepts of 'effectiveness' and 'efficiency' require, respectively, that attention is paid to the suitability of an instrument in achieving a previously set goal and to the costs involved in terms of human resources and money in using an instrument.

1.2. Problems in practice

Theoretically, determining which instrument(s) to apply in a specific case should align with the principles of 'effective, coherent, and efficient application.' However, in practice, several challenges and issues arise, as illustrated by the following non-exhaustive examples:

a. If the presence of the suspect for an interrogation is needed, there is of course a possibility that the suspect will voluntarily comply with a summons to appear. Depending on the circumstances of the case, issuing an EIO or an EAW might be more effective. However, these are more coercive instruments. An assessment of the proportionality of using a coercive measure in a concrete case requires that less or non-coercive means to obtain the presence of the suspect are taken into account. In this situation, the competent authority has decided that judicial cooperation is necessary but has not decided yet on the particular form of judicial cooperation. The issuing Member State has to make a choice between the overlapping instruments. Therefore, the issue of effective and coherent application arises.
b. In many cases there is a choice between transferring the proceeding to another Member State and issuing an EAW for prosecution. This is for instance the case when a national of another Member State resides in that other Member State and the only connection with the prosecuting Member State is that he committed an offence there. The Member State of origin can offer proceedings in the accused's language and can provide better reintegration in case of conviction.

[4] Available on the website of the project: https://mutualrecognitionnextlevel.eu/sites/mutual-recognition/files/2023-11/MR2.0%20Some%20Preliminary%20Explorations.pdf.

c. Also, in many cases there is a choice between transferring the execution of a sentence to another Member State and issuing an EAW for execution of that sentence. This is, for instance, the case when a sentence is imposed on a national of another Member State who also resides there and the only connection with the sentencing Member State is that he is convicted there for an offence. The Member State of origin can offer execution in a more familiar environment and can provide better reintegration.
d. Some decisions taken in the course of criminal proceedings have the effect of influencing the application of certain instruments on judicial cooperation. Moreover, at the stage of the criminal proceedings where the procedural decision must be taken, the need for judicial cooperation might not exist yet. Two examples: 1. when a national court is faced with a choice between detention on remand of a defendant who has his permanent residence in another Member State or releasing him on bail, that decision determines which instrument is applicable or not; 2. when a national court must choose between sentencing a national of another Member State, to a custodial sentence or a probation decision or an alternative sanction equally determines whether FD 2008/909 or FD 2008/947 is applicable. In both examples, the decision taken by the competent authority can rule out the application of less burdensome forms of judicial cooperation.

These examples demonstrate that decision-making in criminal proceedings often involves choosing between multiple options. While having options is not inherently problematic, the lack of guidance from the legal instruments themselves[5] can complicate the decision-making process, particularly in achieving effectiveness, coherence and efficiency in their application. Except for the EIO,[6] the applicable legal instruments do not provide a priority order, as many decisions depend on case-specific circumstances and other factors. Ensuring alignment with the concepts of coherence, effectiveness, and efficiency requires careful assessment in each situation.

1.3. Objectives of the research project

The general principles of proportionality and effectiveness in EU law, rooted in the principle of sincere cooperation,[7] require that EU instruments in the area of freedom, security and justice, are applied in an effective, coherent and efficient fashion. Such an application must ensure the due respect of the fundamental rights of the suspect, accused, and convicted person, while also addressing the need to prevent impunity. Consequently, much depends on the issuing authority's decision to choose one specific instrument over another. In essence, these instruments must be integrated into a unified framework that ensures their effective, coherent and efficient application.

This project seeks to promote judicial cooperation and contribute to the effective, coherent and efficient application of the EU and international instruments mentioned

5 See, however, recital (25) of Directive 2014/41/EU.
6 Ibid.
7 Pursuant to Article 4(3) of the Treaty on European Union, Member States must 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations (…) resulting from the acts of the institutions of the Union'. See also Chapter 7.1.3.

above. In doing so, the project addresses, *inter alia*, the alternatives to pre-trial detention, with a particular focus on the ESO. Additionally, the project aims to assist the (judicial) authorities of the Member States competent to apply those instruments, as well as those involved in conducting criminal prosecutions, holding trials, and enforcing sentences, including public prosecutors, courts, defence counsel, and judges.

Considerable knowledge already exists about the incompatibilities of mutual recognition instruments and practical challenges in their application. The Ninth Round of Mutual Evaluations has identified important information concerning various points for improvement.[8] Similarly, the two earlier projects *InAbsentiEAW* and *ImprovEAW*, along with other Commission-funded projects, have provided valuable insights. Most of these projects have focused primarily on the surrender proceedings under the EAW FD and the intersections between surrender proceedings and other legal instruments.

One of the major findings of the *ImprovEAW* project is that applying the EAW in an effective and coherent manner poses challenges in the daily practice. This is a more generic problem. Indeed, ineffective, incoherent and inefficient application of the instruments:

- does not lead to the best decision in the given circumstances;
- is unduly burdensome for the person concerned and can prejudice his right to liberty;
- can lead to longer pre-trial detention in the issuing Member State than is strictly necessary;
- can lead to unfavourable treatment of an EU national;
- can cause delays in the prosecution of criminal cases and the execution of sentences;
- can lead to impunity;
- may even be an explanation for a high number of refusals. It may be expected that better use of alternatives may reduce refusals;
- requires unnecessary effort by and generates unnecessary costs for the authorities of both Member States involved that could have been avoided;
- may not provide the accused with effective judicial protection and a fair trial;
- may not contribute to their social rehabilitation and reintegration;
- can weaken mutual trust between the authorities of the Member States.

At the start of this project, we identified a number of potential explanations for such instances of ineffective, incoherent and inefficient application of the instruments mentioned above, which may stem from the EU/CoE level, the implementation of those instruments into national law or their application by national authorities:

- the instruments themselves are not coherent: it could be that the applicable instruments are not sufficiently in tune with one another and could promote unilateral approaches;
- national law adopted to transpose those instruments is not coherent (including the choices made in attributing the competence to apply the various instruments to national authorities);
- the application by national authorities is incoherent.

8 Council conclusions, 'The European arrest warrant and extradition procedures – current challenges and the way forward', O.J., 2020, C 419/23.

By the end of the project, we are able to identify some causes of ineffective, incoherent, and inefficient application, along with some solutions. The solutions aim to enhance the coherence between the instruments and, where necessary, improve their effective, coherent, and efficient application. They are expected to contribute to achieving the following objectives:

- lead to the best decision based on the specific circumstances of the case;
- lead to a more proportionate use of those instruments (the least intrusive instrument is applied);
- reduce (the incidence and duration of) pre-trial detention in the issuing Member State by imposing supervision measures and applying the ESO instead of issuing an arrest warrant and using the EAW);
- reduce infringements of the fundamental rights of defendants and convicted persons;
- prevent impunity;
- reduce costs and reduce the duration of prosecutions and enforcement proceedings;
- strengthen mutual trust between the competent authorities of the Member States.

1.4. Methodology

To be able to perform the analysis of effectiveness, coherence and efficiency (or lack thereof) between EU instruments a focused **Annotated Index** has been drafted by the Management Team (MT). The draft Index contained questions and points of attention to ascertain which problems the authorities of a Member State encounter in the effective, coherent and efficient application of the instruments and how these problems are dealt with (from the perspective of both national law and daily practice with a focus on subject matter, conditions for application, and competent authorities). Another important aim of the Annotated Index was to ensure that the country reports would be, more or less, uniform as to their structure, thus facilitating an analysis of those reports. Additionally, the Annotated Index was adopted after consultation with the Research Team (RT) as well as with the Sounding Board (SB) and fine-tuned in a second meeting of the RT after the National Academic Researchers (NARs) had their experiences with its implementation. The questions of the Index seek to identify what stands in the way of a coherent, effective and efficient application of the legal instruments.[9]

The NARs have elaborated a **country report** of their respective Member States. Each country report contains a thorough analysis of national legislation, national case law, and daily practice. In these reports, the NARs have identified the competent authorities in judicial cooperation in criminal matters and their respective tasks. In conducting the research, the NARs adopted the perspective of their Member State as issuing State, i.e. the Member State requesting cross-border cooperation with other Member States. Additionally, the NARs brought together practitioners of their Member State experts in each of the modalities of cooperation (EAW, ESO, EIO, transfer of proceedings, transfer of sentences, etc.) to gather data on daily practice.

[9] See pp. 31-32.

In addition to desk research of the relevant laws and case laws, the NARs conducted **semi-structured interviews**. This approach ensured that all forms of cooperation were covered, including those with limited practice in their Member State.

The Research Team consists of the **Management Team** (MT):

- project leader Prof. André Klip, professor of Criminal Law, Criminal Procedure and the Transnational Aspects of Criminal Law at Maastricht University and judge of the Court of Appeal of 's-Hertogenbosch (the Netherlands);
- principal researcher, Prof. Vincent Glerum, senior legal advisor at the District Court of Amsterdam and professor of International and European Criminal Law at the University of Groningen (the Netherlands);
- judge/researcher Mr. Hans Kijlstra, judge of the District Court of Amsterdam (the Netherlands);
- project manager Mr. Gaetano Ancona, PhD student at Maastricht University (the Netherlands).

National Academic Researchers (NARs)

- Prof. Mar Jimeno Bulnes, Professor of Procedural Law at the Facultad de Derecho of Universidad de Burgos, Spain; in conducting the research she cooperated with Serena Immacolata Sabrina Cacciatore, at the moment postdoctoral researcher at the University of Palermo and M. Isabel Merino Díez, Technical Assistant at the University of Burgos;
- Prof. Martin Böse, Professor of Criminal Law, Criminal Procedure, as well as International and European Criminal Law at the Rheinischen Friedrich-Wilhelms-Universität Bonn, Germany; in conducting the research he cooperated with Ruth Schumacher, research assistant at Bonn University;
- Prof. Vincent Glerum (see above);
- Prof. Małgorzata Wąsek-Wiaderek, professor of Criminal Procedure at the John Paul II Catholic University of Lublin and judge of the Supreme Court (Poland); in conducting the research she cooperated with Dr Adrian Zbiciak, lecturer at the John Paul II Catholic University of Lublin and judge of the District Court in Chełm, Poland and Dr Marek Smarzewski, lecturer at the John Paul II Catholic University of Lublin and defence lawyer practising in Lublin.

Sounding Board members (SB)

The project greatly benefited from the quality and active participation of the Sounding Board, which focused on the practical usability of the Annotated Index and the recommendations. Comprising practitioners from Member States not represented in the four national reports, the Sounding Board ensured that the questions posed in the questionnaire, the methods used, and the recommendations in the final report had Union-wide applicability.

Its members were for:

1. Austria: Fritz Zeder (Head of Unit, Federal Ministry of Justice);
2. Belgium: Michael Groven (Office of the Prosecutor);
3. Bulgaria: Aneta Petrova (Professor, Federal University for Applied Administrative Sciences);
4. Croatia: Dražen Jelenić (Deputy State Attorney General);

5. Czech Republic: Jan Petr (Investigator, Financial Crime Unit of the Criminal Police and Investigation Service);
6. Denmark: Henning Fuglsang Sørensen (Associate Professor, Syddansk Universitet);
7. Estonia: Jaan Ginter (Professor, University of Tartu);
8. Finland: Tuuli Eerolainen (State Prosecutor);
9. France: Jean-François Thony (President of the Siracusa International Institute for Criminal Justice and Human Rights);
10. Greece: Amalia Bakaloni (National Member for Greece, Eurojust);
11. Hungary: Szabolsc Hornyak (Judge);
12. Ireland: John Edwards (Judge);
13. Italy: Teresa Magno (Judge);
14. Latvia: Vadims Petrovs (Judicial Police, Europol);
15. Lithuania: Gintaras Švedas (Professor, Vilnius University);
16. Portugal: Vânia Costa Ramos (Defence Counsel);
17. Romania: Mariana Radu (Ministry of Justice, cooperation unit/Eurojust);
18. Slovakia: Anna Ondrejova (General Prosecutor's Office);
19. Sweden: Per Hedvall (Director, Swedish Prosecution Authority).

In the project design, two methodological challenges required to make choices: the wish to have a *significant role of practitioners* and the necessity to have a *small number of Member States* involved in the project for the case studies. The data we needed for this project had to come from practitioners in their capacity as issuing authorities, prosecutors, judges, courts, defence counsels and, in some instances, ministries. As many of those practitioners may have a task concerning one modality of cooperation only, we needed the NARs to bring this into analysis. From the experience in previous research, we have also learned that the added value of more Member States to find problems in the cooperation between the Member States is limited. There are basically two explanations for this: the first is that in international cooperation very few problems are Member State specific. The second is that the analysis of how an individual Member State's practice functions is always in its cooperation with *all Member States*. As a result of this, the practice of all Member States is indirectly taken into consideration anyway and that does not necessarily require a high number of case studies of the Member States.

1.5. Choice for the four country reports Germany, the Netherlands, Spain and Poland

The choice for the Member States was based on the following criteria:
- Diverse national legal systems, such as opportunity and legality Member States;
- Representative geographical selection;
- Smaller and bigger Member States;
- Includes Member States often referring cases to the CJEU as well as Member States hardly ever doing so;
- Member States that have centralised certain competencies in cooperation and Member States that have not done so.

This led to the choice of the following Member States: The Netherlands, Germany, Poland and Spain. Whilst on the basis of the criteria formulated potentially also other Member States could have been included, they do justify the choices for these four Member States. Limitations had to be made on a cost/benefit basis, and the research methodology does not require a large number of Member States for the case studies. **The Netherlands** is a smaller Member State applying the opportunity principle with regard to prosecution. In EAW cases, it often refers preliminary rulings to the CJEU. It has centralised some of its competencies on international cooperation. **Germany** is the largest Member State, and it applies the legality principle with regard to prosecution. It occasionally also refers cases to the CJEU. It did not centralise its cooperation competencies and opposed ratifying the 1972 Convention on the transfer of proceedings. **Poland** is a big Member State. It has a wide practice of cooperation and often made amendments to bring its legislation in compliance with EU demands. It decentralised its competencies on cooperation and has some practice on the transfer of proceedings. **Spain** is a big Member State with an entirely different civil law tradition. It has partially centralised competencies in cooperation. There are but a few referrals from Spanish courts to the CJEU.

1.6. Brief outline of the report

Chapter 2 outlines the normative and theoretical frameworks of the project. It explains the concept of 'effective and coherent application', identifies the relevant EU and CoE instruments, and examines their applicability. Additionally, it addresses the roles and responsibilities of competent issuing and central authorities.

Chapters 3 to 6 are dedicated to the national reports for Germany, the Netherlands, Poland, and Spain. These reports are based on the Annotated Index, a structured outline containing the framework of the report and specific questions organised according to the stages of the criminal proceedings: pre-trial, trial and enforcement.

Each national report is organised as follows. The first section assesses the implementation of the relevant EU and CoE instruments into national law and addresses the competent authorities and central authorities designated by the Member States, as well as coordination between the different authorities. The second section examines issues of applicability and application of these instruments at both the European and national levels during the pre-trial and trial stages of the criminal proceedings. Similarly, the third section addresses applicability and application challenges during the enforcement stage. The fourth and fifth sections deal with subjects that, strictly speaking, are somewhat outside of the scope of the Annotated Index: whether courts and judges, when sentencing, take into account a possible future need for cooperation (section 4), what decisions authorities take in finding out the whereabouts of the person concerned and whether courts and judges, when trying a person who is not present, anticipate the (im)possibilities of judicial cooperation with regard to *in absentia* convictions (section 5). Finally, some of the chapters conclude with a paragraph concerning best practices and/or desired developments (the Memorandum).

Chapter 7 builds on the insights and analyses from the national reports to present the overall findings of the project. This chapter identifies specific issues that impede the coherent and effective application of the relevant instrument.

Conclusively, the report contains recommendations aimed at enhancing the coherent, effective, and efficient application of the legal instruments.

2. MR2.0: Some Preliminary Explorations[1]

Vincent Glerum and Hans Kijlstra

2.1. Introduction

This memorandum is meant as a prelude to drafting a uniform structure for the country reports. Section 2.1. concerns the scope of the project (normative framework; relevant EU and CoE instruments; type of decisions). Sections 2.2.-2.7. offer preliminary explorations of some aspects concerning coherence (or lack thereof) between the instruments listed in Section 2.2.: temporal aspects (Section 2.3.), mutual exclusivity (Section 2.4.), complementarity (Section 2.5.), competent authorities (Section 2.6.) and central authorities (Section 2.7.).

2.2. Scope of the project: normative framework

In defining the scope and the core issue at stake, the starting point is the aim of the EU call for proposals: "The aim of this call for proposals is to promote judicial cooperation in criminal matters and to contribute to the effective and coherent application of EU mutual recognition instruments in criminal matters".[2]

This raises at least two questions.

i. What do we mean by "effective and coherent"?
ii. Which EU mutual recognition instruments do we take into account?

i. Effectiveness and coherence

Without getting too theoretical, we think it is wise to have some theoretical guidance on these concepts.[3] However, the theory should not stand in the way of the practical approach, which the project *MR 2.0* should strive for.

---

1 These explorations are mainly based on the text of the applicable instruments and on the case-law of the Court of Justice, not on literature.

2 The importance of coherence is also recognised by the CJEU: Joined Cases 566/19 PPU &626/19 PPU, ECLI:EU:C:2019:1077 (*Parquet général du Grand-Duché de Luxembourg and Public prosecutors in Lyon and Tours*), para. 43.

3 We drew some inspiration from the way this concept is tackled in the theory of law, logic, mathematics, etc.

So, then the question is: under which conditions is the application of mutual recognition instruments in a given individual case effective and coherent?[4]

We could use the following dimensions of the concept of 'effectiveness[5] and coherence'.

- Comprehensiveness
  - All available options should be taken into consideration.[6]
- Consistency
  - No instruments should be applied that are inconsistent with an instrument already applied.
- Completeness
  - Every available instrument should be applied as long as the objective is not achieved (and in so far as its application meets the other criteria).[7]
- Proportionality
  - Choose among the available instruments the instrument that is sufficiently effective and the least intrusive.[8][9] It is referred here to the Report ImprovEAW, especially section 2.5.6, which deals at length with all the elements of proportionality.

In other words, to be effective and coherent in the application of mutual recognition instruments in an individual case, available instruments should not be overlooked, decisions to apply an instrument should not be contradictory, as long as there remains an option this option should be used and, finally, this has all to be done with the lowest costs (in the broad sense of the word, i.e. in terms of money, time and impact on the requested person).

So, the answer to the question posed before is: the application of instruments in a given individual case[10] is effective and coherent if (and only if) instruments are applied in a comprehensive, consistent, complete and proportional way.

---

4 The project does not aim at a theoretical and abstract analysis of the (lack of) coherency on the level of EU-legislation and/or national legislation and/or EU or national policies in general. The project aims at enhancing the coherency of the *application* of mutual recognition instruments in full practice, i.e. at the level of taking decisions in individual cases.

5 This concept of 'effectiveness' is relevant on the level of taking decisions in an individual case on choosing one or more mutual recognition instruments that will be applied. Effectiveness in the sense of applying an instrument, once chosen, in the most effective way considering the costs involved and the goal to be reached falls without the scope of the project.

6 There is no use talking about comprehensiveness when only one option is available.

7 This dimension of course relates to the overall objective of preventing impunity.

8 This dimension of course relates to the other overall objective of protecting the rights of the requested person.

9 When assessing the proportionality of an available instrument, at least the following dimensions should be taken into account. Using an instrument without detention is less intrusive than using an instrument with detention (e.g., the EAW). Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

10 This is about coherence at an individual level (coherence in a given case). It is also important to look at coherence at a general level. The application of instruments in a given case should at least be consistent with the application of instruments in another case, but this is out of scope.

2.2.1. Scope of the project: relevant EU and CoE instruments

This research project focuses on coherence in the application of a number of EU and CoE instruments covering judicial cooperation in criminal matters, from the start of a criminal investigation right through to the enforcement of a sentence (custodial sentence/measure involving deprivation of liberty; probation decision; alternative sanction).[11] These instruments are:

EU

- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union[12] (concerning the provisions on sending and service of documents);
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States;[13]
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;[14]
- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;[15]
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;[16]
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters;[17]
- Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions;[18]

CoE

- European Convention on the Transfer of Proceedings in Criminal Matters.[19]

---

11 Not included in the scope of the project: financial penalties (Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ* L 76/16, as amended by FD 2009/299/JHA, *OJ* L 81/24) and freezing orders and confiscation orders (Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *OJ* L 303/1)

12 *OJ* C 197/3.

13 *OJ* L 190/1, as amended by FD 2009/299/JHA, *OJ* L 81/24.

14 *OJ* L 327/27, as amended by FD 2009/299/JHA, *OJ* L 81/24.

15 *OJ* L 337/102, as amended by FD 2009/299/JHA, *OJ* L 81/24.

16 *OJ* L 294/20, as amended by FD 2009/299/JHA, *OJ* L 81/24.

17 *OJ* L 130/1.

18 Brussels, 8.12.2022, C(2022) 8987 final

19 Strasbourg 15 May 1972, ETS No. 73.

On 5 April 2023, the European Commission submitted a proposal for a regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters.[20] In order to ensure that the outcome of the project remains current we should include this proposal in our research.

2.2.2. Scope of the project: type of decisions

Another way of determining the scope is to look at the type of decisions that need to comply with the *effective and coherent* requirement. It seems to be implied in the research proposal to include decisions relating to, *inter alia*:
- The decision (not) to release the suspect;
- The decision to issue an EIO;
- Determining which state will "do" the case (to transfer or not to transfer);
- The decision to issue an EAW for prosecution;
- Determining which state will execute the sentence (to transfer or not to transfer);
- The decision to summon a defendant abroad;
- The decision to issue an EAW for execution.

2.3. Temporal aspects of applicability (the stages of criminal proceedings)

In this section, the various instruments are considered from the perspective of their (non-)applicability to the different stages of a criminal case.

Taking the lead from Article 31 EU and Article 82(2)(1)(d) TFEU, as interpreted by the Court of Justice,[21] one can differentiate between the following stages:
- the pre-trial stage;
- the trial itself;
- the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence.

By their very nature, some of the instruments are applicable to only some of those stages and inapplicable to others. For instance, the instruments concerning mutual recognition of sentences only pertain to the enforcement stage. For these instruments to apply there must be a *final* decision imposing a sentence (Article 1(a) FD 2008/909/JHA; Article 2(1) FD 2008/947/JHA).[22] Therefore, these instruments are not applicable to the pre-trial and trial stages.

Conversely, the European supervision order (ESO) and the European Investigation Order (EIO) inherently do not apply to the enforcement of sentences. The ESO provides an alternative to provisional detention *pending trial*. The EIO aims at having

20 COM (2023) 185 final.
21 Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*), paras. 53-56.
22 Case 582/15, ECLI:EU:C:2017:37 (*Van Vemde*), para. 24.

a specific *investigative* measure carried out in another Member State *to obtain evidence* (Article 1(1) Directive 2014/41).

By contrast, the provisions on sending and service of documents of the EU Convention on Mutual Assistance also apply to the enforcement of sentences. That convention *supplements*, *inter alia*, the Additional Protocol to the European Mutual Assistance Convention.[23] Article 3(a) Additional Protocol declares that the European Mutual Assistance Convention also applies to 'the service of documents concerning the enforcement of a sentence (...)'.

The EAW has an alternative scope: an EAW can either be issued for the purpose of conducting a criminal prosecution or for the purpose of executing a custodial sentence or detention order (Article 1(1) FD 2002/584/JHA). This instrument, therefore, can be applicable to the enforcement stage or to stages preceding the enforcement stage.

Both the EIO and the EAW are applicable prior to the enforcement stage. As we have seen, the EIO concerns *investigative* measures, whereas an EAW can be issued for conducting a criminal *prosecution*. How to demarcate 'investigation' on the one hand and 'prosecution' on the other? And how to assign the EIO and the EAW to one or more of the stages preceding the enforcement phase?

Nothing in FD 2002/584/JHA seems to limit the scope of prosecution-EAWs to cases that are trial-ready or are already pending before a court.[24] This is confirmed by the legal basis of that framework decision (Article 31 TEU), which refers to cooperation between judicial authorities in relation to 'proceedings' and the 'enforcement of decisions'. The former concept 'is capable of encompassing the entirety of criminal proceedings, namely the pre-trial phase, the trial itself and the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence'.[25] Recital (5) of the preamble of FD 2002/584/JHA also speaks of 'judicial decisions in criminal matters, covering both pre-sentence and final decisions'.[26] Finally, recital (25) of Directive 2014/41

23 Strasbourg 17 March 1978, ETS No. 99. All EU Member States have ratified the Additional Protocol.

24 When adopting FD 2002/584/JHA, Ireland made a statement which reads as follows: 'Ireland shall, in the implementation into domestic legislation of this Framework Decision, provide that the European Arrest Warrant shall only be executed for the purpose of bringing that person to trial or for the purpose of executing a custodial sentence or detention order.' (Council document 14867/1/01 of 11 December 2001). However, according to the case-law of the Court of Justice such a statement, which is not reflected in the provisions of the relevant instrument, is irrelevant to the interpretation of that instrument.

25 Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456 (*OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*), para. 54.

26 'The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice'.

suggests that the concept of a 'prosecution' encompasses but is not limited to 'bringing [a person] before a court for the purpose of the standing trial [sic]'.[27]

In a prosecution-case, the only requirement for issuing an EAW is the existence of 'an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2' (Art. 8(1)I FD 2002/584/JHA). This means that there must be a national arrest warrant issued by a 'judicial authority', such as a court or a public prosecutor but not the police.[28] The requirement of a national arrest warrant necessarily means that there must be evidence against the requested person of a 'reasonable suspicion of having committed an offence' (cf. Art. 5(1)(c) ECHR). The Court of Justice has defined the autonomous concept of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' as covering 'national measures adopted by a judicial authority to search for and arrest a person who is the subject of a criminal prosecution, with a view to bringing that person before a court for the purpose of conducting the stages of the criminal proceedings'.[29] It has also indicated that a measure adopted by a public prosecutor ordering that the person concerned 'be placed in detention for a maximum of 72 hours with a view to enabling that person to be brought before the court which has jurisdiction to adopt a pre-trial detention measure' would meet that definition.[30]

To sum up: in order to issue a prosecution-EAW there must be evidence of a reasonable suspicion of having committed an offence, a judicial authority (not the police) must have issued an arrest warrant against the person concerned and that arrest warrant must aim at bringing that person before a court 'for the purpose of conducting the stages of the criminal proceedings'. Although far from offering us a clear-cut definition of the concept of a 'criminal prosecution', these requirements do make clear that this concept excludes its applicability to the initial stages of an investigation by the police in which there is no *judicial* involvement yet. After all, the intervention of a *judicial* authority is required with the aim of bringing the person concerned before a *court*.

According to the preamble of Directive 2014/41, the EIO sets out 'rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence'. Such measures may, e.g., consist in the temporary transfer of a person 'for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required' or in carrying out a hearing of a person by videoconference. However, if a transfer is to be carried out 'for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/

---

27 'This Directive sets out rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence. For example, an EIO may be issued for the temporary transfer of that person to the issuing State or for the carrying out of a hearing by videoconference. However, where that person is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA (...)'.

28 Case 453/16 PPU, ECLI:EU:C:2016:860 (*Özçelik*), paras. 31-33.

29 Case 414/20 PPU, ECLI:EU:C:2021:4 (*MM*), para. 57.

30 Case 414/20 PPU, ECLI:EU:C:2021:4 (*MM*), paras. 55-56

JHA'.[31] This recital juxtaposes the concept of 'investigative measures' with the concept of 'prosecution'. Nevertheless, these concepts do not seem to be mutually exclusive, in the sense that the concept of 'prosecution' does not seem to exclude that the investigation continues during the 'prosecution'. After all, recital (26) addresses the choice between issuing an EIO and an EAW from the angle of proportionality, thereby suggesting that issuing an EAW partly with a view of carrying out investigative measures is not ruled out *a priori*: 'With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative'.

Transfer of criminal proceedings on the basis of the European Convention on Transfer of Proceedings in Criminal Matters covers all three stages of criminal proceedings. According to the Explanatory Report 'Transfer implies that the requesting State has instituted proceedings, that the first stage of the criminal proceedings has been begun and is perhaps completed, and that the presumed perpetrator is known. It is possible that the investigations against the accused have been carried out in the requesting State and that the trial stage has already been reached, or that a judgment has been rendered but not yet enforced'.[32]

Table 1. Applicability of the instruments to the various stages of criminal proceedings.

	Pre-trial stage	Trial stage	Enforcement stage
EU Convention on Mutual Assistance	X	X	X
EAW	X	X	X
MR Cust.			X
MR Prob.			X
ESO	X	X	
EIO	X	X	
EC on Transfer of Proceedings	X	X	X

31 Recital (25).

32 Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters, para. 27.

2.4. Mutual exclusivity

Some instruments pursue objects that inherently are mutually exclusive, although these instruments are applicable to the *same* stage(s) of criminal proceedings. Take, e.g., the EAW and the ESO. Although both can be applied in the pre-trial stage, in order to issue a prosecution-EAW an *enforceable* national arrest warrant must exist (Article 8(1)(c) FD 2002/584/JHA). On the other hand, in order to issue an ESO the must be a 'decision on supervision measures', i.e. an 'enforceable decision taken in the course of criminal proceedings (...) imposing on a natural person, *as an alternative to provisional detention*, one or more supervision measures' (Article 4(a) FD 2009/829/JHA).[33] Consequently, the existence of an enforceable decision on supervision measures excludes the possibility of the existence of an enforceable national arrest warrant against the same person for the same offence(s) and *vice versa*.

Likewise, the ESO and the European Convention on the Transfer of Proceedings in Criminal Matters are mutually exclusive. An ESO is issued to allow a person concerned to await his trial in the *issuing* Member State while he is in freedom in another Member State (his Member State of residence). The object of the ESO, which is geared to ensuring attendance at the trial in the issuing Member State, is incompatible with a transfer of the proceedings by that Member State to another Member State.

Equally, the object of a prosecution-EAW (conducting a criminal prosecution in the issuing Member State) is incompatible with a transfer of proceedings by the issuing Member State to another Member State. Similarly, the object of an execution-EAW (enforcement of a sentence in the issuing Member State) is incompatible with the object of applying FD 2008/909/JHA (enforcement of the sentencing of the executing Member State).[34]

If only a final custodial sentence or detention order was imposed, FD 2008/947/JHA on probation decisions and alternative sanctions is not applicable to the mutual recognition and enforcement of that sentence or order. Conversely, if only a final probation order or alternative sanction was imposed, FD 2008/909/JHA does not apply to the mutual recognition and enforcement of those penalties.

Where instruments are mutually exclusive, decisions taken by national authorities in the ordinary course of criminal proceedings determine which instrument would be applicable when the need for judicial cooperation should arise. E.g., if a court decides that the imposition of an alternative sanction would not do justice to the seriousness of the offences and imposes a custodial sentence instead, FD 2009/909/JA will apply to its enforcement in another Member State, not FD 2008/909/JHA. The same holds true for certain pre-trial decisions. For instance, if a court decides to order the provisional

33 Emphasis added.

34 However, Article 4(6) of FD 2002/584/JHA allows the executing judicial authority to have the sentence enforced in the executing Member State where the EAW was issued against a national or resident of that Member State or against a person staying in that Member State. When Article 4(6) FD 2002/584/JHA is applied, the provisions of FD 2008/909/JHA apply *mutatis mutandis* to the enforcement of the sentence 'Without prejudice to Framework Decision 2002/584/JHA' and 'to the extent they are compatible with provisions under that Framework Decision' (Article 25 FD 2008/909/JHA).

detention of a defendant instead of conditionally releasing him, FD 2009/829/JHA does not apply.

However, one can argue that the discretion conferred by national law to take such decisions is limited by EU law. Such decisions could be influenced by the circumstance that the person concerned resides in another Member State. After all, carrying out an alternative sanction or supervising conditions imposed in the context of release from provisional detention will be more difficult when the person concerned resides in another Member State. However, refraining from imposing an alternative sanction or refraining from conditional release solely on account of the person's residence in another Member State amounts to indirect discrimination on the basis of nationality. A distinction between residents and non-residents 'is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners'.[35] Complications concerning the enforcement of judicial decisions against persons who reside abroad can objectively justify such a distinction but only in the absence of EU rules on the enforcement of such decisions.[36] Since such rules exist (FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA), national authorities cannot base their decision solely on a person's non-residency when faced with a choice between imposing a custodial sentence or an alternative sanction or with a choice between provisional detention or conditional release.

Table 2. Mutual exclusivity

	EU Convention on Mutual Assistance	**EAW**	**MR Cust.**	**MR Prob.**	**ESO**	**EIO**	**EC Transfer of proceedings**
EU Convention on Mutual Assistance							
EAW			X execution		X prosecution		X
MR Cust.				X			
MR Prob.			X				
ESO		X					X
EIO							
EC Transfer of Proceedings		X			X		

35 Case 29/95, ECLI:EU:C:1997:28 (*Pastoors and Trans-Cap v Belgische Staat*), para. 17.
36 Case 29/95, ECLI:EU:C:1997:28 (*Pastoors and Trans-Cap v Belgische Staat*), paras. 20-22.

2.5. Complementarity

Some instruments that are applicable to the same stage(s) of criminal proceedings can be applied complementary to one another, even though they have mutually exclusive objects.

E.g., FD 2008/909/JHA and FD 2008/947/JHA can complement one another in cases in which:

- a custodial sentence was imposed consisting of an enforceable part and a suspended part
- in addition to a custodial sentence a probation decision and/or an alternative sanction was imposed.

What holds true for instruments that are applicable to the same stage(s) of criminal proceedings but have mutually exclusive objects *a fortiori* holds true for instruments that are applicable to the same stage(s) but do not have mutually exclusive objects.

E.g., a prosecution-EAW can be combined with an EIO when the person concerned is in the territory of the executing Member State and it is also necessary to gather evidence in that Member State. The same holds true for issuing an ESO and an EIO.

And complementary to issuing an EAW or an EIO, documents can be sent to or served in the executing Member State. The same holds true for issuing an ESO.

Table 3. Complementarity

	EU Con Mutual Assist.	**EAW**	**MR Cust.**	**MR Prob.**	**ESO**	**EIO**	**EC Transfer of Proceedings**
EU Convention of Mutual Assistance		X[37]			X	X	
EAW	X[38]					X prosecution	
MR Cust.	X			X			
MR Prob.	X		X			X	
ESO	X	X				X	
EIO	X	X prosecution			X		
EC on Transfer of Proceedings							

[37] However, sending or serving documents to the requested person could undermine the 'certain element of surprise' which an EAW must have 'in particular in order to stop the person concerned from taking flight': compare Case 396/11, ECLI:EU:C:2013:39 (*Radu*), para. 40.

[38] Sending or serving of documents undermines the element of surprise of an EAW.