



MUTUAL RECOGNITION 2.0

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PUBLIC

INDEX FOR THE COUNTRY REPORTS

Introduction

Content

This document contains the annotated index that will be used to draft the Country Reports. For reasons of accessibility, the annotated index will be preceded by the non-annotated index.

The index consists of five Chapters:

1. The instruments and national law;
2. The application of the instruments: investigation/prosecution;
3. The application of the instruments: enforcement;
4. Anticipating the application of instruments: sentencing;
5. Miscellaneous: whereabouts unknown and *in absentia*.

MR2.0 Methodology

The research to be conducted by the NARs consists of three elements:

- I. European/national law and national case-law (essentially concerning issues of transposition, competent national authorities, and the scope of European/national instruments);
- II. Considerations that (can) play a role when the competent national authority decides whether or not to request a specific form of judicial cooperation;
- III. Whether the competent national authorities apply the instruments in an ‘effective and coherent’ manner (within the meaning of *MR2.0: some preliminary explorations*).¹

¹ To be effective and coherent in the application of mutual recognition instruments in an individual case, available instruments should not be overlooked (**comprehensiveness**), decisions to apply an instrument should not be contradictory (**consistency**), as long as there remains an option this option should be used (**completeness**) and,

Ad I

This element of the research is partly descriptive, and partly analytical (the latter with regard to the scope of European/national instruments).

The NARs will draw upon their own knowledge as national experts² and supplement it, if need be, by case-law and legal literature research.

Ad II

This element of the research is descriptive.

Case-file research does not seem to be the most adequate means of research to get those considerations out into the open. The most direct source of information on such considerations are the competent national authorities themselves. Therefore, qualitative interviews with representative members of the competent national authorities are the best method of getting a clear picture of what these considerations are. For pragmatic reasons, it is only possible to interview a relatively small number of representative practitioners. In order to ensure that the findings – and any conclusions based on them (see Ad III) – are sufficiently valid, the selection of practitioners is of particular importance. Moreover, the NARs are encouraged to include not only practitioners who are members of the competent national authorities but also other practitioners (such as defence lawyers), and academics. The NARs are furthermore encouraged to refer to any cases they are aware of, to national case-law (e.g. judicial decisions on appeal against decisions of the competent authority whether or not to request judicial cooperation) or to literature, wherever possible, in order to corroborate or refute, as the case may be, the considerations mentioned by the interviewees. In addition, in the stage of drawing up the research report the findings from the other Member States could also be used as corroboration/refutation.

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) (**proportionality**). See *MR2.0: some preliminary explorations*.

² And, where necessary, the knowledge of other experts.

Ad III

This element is of an analytical and a more normative nature.

The NARs will analyse the considerations that play a role when their MS' authorities decide whether or not to request judicial cooperation (see Ad II) and will determine whether those authorities apply the instruments in an 'effective and coherent' manner.

In doing so, they will also identify:

- any defects that stand in the way of 'effective and coherent' application, *e.g.* defects in:
 - o EU/CoE legislation;
 - o National legislation;
 - o National practice;
- any best practices that facilitate 'effective and coherent' application.

Output

The research will result in:

- a country report in which the outcome of the first two elements of the research as described above will be laid down and which will be part of the final research report;
- a separate memorandum which contains the outcome of the third element and which will be used for drafting the overall analysis based on all country reports.

In the country reports, The NARs will follow the general rules on citation and the specific points of style of the Common Market Law Review.³ However, by way of derogation from these points of style, paragraphs should be numbered.

³ <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/europees-recht/houserul2020.pdf>.

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⁴ *Legenda*: black is unannotated index; red is annotation.

⁵ ‘Applicability’ concerns the scope of the instruments with regard to the various stages of investigation/prosecution. In other words, whether those stages are covered by the scope of the instruments or not. ‘Application’ (see 2.2 and 2.3) concerns the actual use of those instrument in order to achieve a specific objective.

⁶ The distinction between (a) and (b) concerns situations in which the need for cooperation can arise. Some of the instruments are applicable according to the presence of the requested person either in the issuing MS and/or in the executing MS.

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⁷ See footnotes 4 and 5.

MR2.0: Annotated index of Country Report

1. The instruments and national law

General introduction

This chapter deals with two general matters:

1. the transposition/ratification of the instruments by the MS of the NAR;
2. the (judicial) authorities/central authorities designated by that MS under the instruments/convention.

In the proposal, we stated that the ‘perspective adopted by this project is that of a criminal prosecution or enforcement proceedings with a transnational aspect. That transnational aspect is linked to the accused or the convicted person. The accused or convicted person is present in another Member State [than the issuing Member State] or is a national or a resident of another Member State’.⁸ The latter circumstance presupposes that the person concerned is present in the issuing MS. Situations in which the whereabouts of the person concerned are unknown are addressed in Chapter 5.

Only those proceedings in which a subject has been identified fall within the scope of the project. That is to say, situations in which the competent authorities have reasons to believe that an offence was committed but do not yet know who the probable author of that offence was do not fall within the scope. At the same time, an enforcement proceeding is not conceivable without a convicted person whose identity is known.

The proposal also states that the project will focus on instruments that are capable of prejudicing the liberty (in a broad sense) of the suspect/accused/convicted person.⁹

⁸ *Proposal (amended)*, p. 8.

⁹ *Proposal (amended)*, p. 8. With regard to investigation/prosecution we use ‘suspect’, ‘accused person’ or ‘suspect/accused person’.

This means that the perspective of a criminal prosecution or enforcement proceedings with a transnational aspect inherently concerns investigation/prosecution/enforcement proceedings with regard to an offence for which detention on remand¹⁰ is (ultimately) possible.¹¹

Against this background, the project will examine two categories of instruments:

- instruments that involve deprivation of liberty of a suspect, accused or convicted person, and
- instruments that offer a (less intrusive) alternative to measures involving deprivation of liberty of a suspect, accused or convicted person.

In order to establish whether the effectiveness and coherence of the application of instruments involving deprivation of liberty can be improved, it is absolutely essential to include some instruments that do not impinge on the liberty of the person concerned. Some of these instruments could serve as a less intrusive but sufficiently effective – and therefore proportionate – alternative to instruments that do impinge on liberty. Since proportionality is an essential part of our definition of the concept of ‘effective and coherent application’¹² these less intrusive instruments are therefore in scope even though they do not impinge on liberty. This is in line with the European Commission’s Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.¹³

With regard to the concept of ‘intrusiveness’ the following scale could give guidance.

Using an instrument without detention is less intrusive than using an instrument with detention.

Involvement without physical presence in the requesting MS (e.g. through video-conferencing)

¹⁰ We use the term ‘detention on remand’ and not ‘pre-trial detention’ because the latter term seems to exclude detention during the trial stage.

¹¹ The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*) for that offence. After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence.

Consequently, proceedings concerning an offence, which only carries a non-custodial sanction, are out of scope.

¹² See *MR2.0: some preliminary explorations*, p. 2.

¹³ *OJ* 2023, L 86/44. See recital (10): ‘Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred (...)’.

is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

Included in the research are the following instruments:

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD¹⁴ 2002/584/JHA);¹⁵
- 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 (FD 2008/909/JHA);¹⁶
- 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 (FD 2008/947/JHA);¹⁷
- 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 (FD 2009/829/JHA);¹⁸
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/41/EU);^{19,20}

¹⁴ 'FD' is a commonly used abbreviation of the words 'Framework Decision'.

¹⁵ *OJ* 2002, L 190/1, as amended by *OJ* 2009, L 81/24.

¹⁶ *OJ* 2008, L 327/27, as amended by *OJ* 2009, L 81/24.

¹⁷ *OJ* 2008, L 337/102, as amended by *OJ* 2009, L 81/24.

¹⁸ *OJ* 2009, L 294/20.

¹⁹ *OJ* 2014, L 130/1.

²⁰ These first five instruments were mentioned in the call document: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/just/wp-call/2021-2022/call-fiche_just-2022-jcoo_en.pdf.

Regulation 2018/1805/EU is mentioned in the call document but not included in the proposal. That regulation only touches upon deprivation of liberty in an indirect way: once a freezing order or confiscation order is recognised by the executing MS, *subsequent* decisions by the competent authorities of the executing MS may include the imposition of a custodial sentence. However, the focus of the project is on the decisions taken by the issuing MS. Moreover, a freezing order or confiscation order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

Not mentioned in the call document and equally not included in the proposal for more or less the same reasons: Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

- 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 (EU Convention on Mutual Assistance in Criminal Matters);^{21,22}
- (CoE) European Convention on the Transfer of Proceedings in Criminal Matters;^{23,24}
- (CoE) European Convention on Mutual Assistance in Criminal Matters.^{25,26}

(The NARs are invited to identify and include other instruments insofar as they can contribute to effective and coherent judicial cooperation.)²⁷

A number of these instruments concern decisions concerning deprivation of liberty *stricto sensu* (FD 2002/584/JHA and FD 2008/909/JHA) or *lato sensu* (restriction of liberty: FD 2008/947/JHA and 2009/829/JHA).

Directive 2014/41/EU does not interfere with the right to liberty of the person concerned, except for the temporary transfer of a person already held in custody for the purpose of investigating measures.²⁸ However, this instrument offers (less intrusive) alternatives to surrender on the basis of a prosecution-EAW: temporary transfer to the issuing MS²⁹ to be interrogated as a suspect/accused person³⁰ and interrogating a suspect/accused person by

Regulation 2023/1543/EU on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings is not included in the research (this regulation will apply from 18 August 2026). The regulation is not directly related to measures concerning deprivation of liberty and a European Production Order /European Preservation Order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

²¹ OJ 2000, C 197/3.

²² Not included in the call document, but included in the *Proposal (amended)*.

²³ Strasbourg 15 May 1972, ETS No. 73.

²⁴ Not included in the call document, but included in the *Proposal (amended)*.

²⁵ Strasbourg 20 April 1959, ETS No. 30.

²⁶ Added during the first Research Team meeting.

²⁷ With the exception of the European Convention on the Transfer of Proceedings in Criminal Matters, the instruments/conventions listed are instruments/conventions that are binding on all MS participating in the project. Bilateral agreements are not included. Including such agreements would hamper making a comparison between the four participating MS ('comparing apples with oranges'). However, if in the opinion of a NAR a bilateral agreement facilitates 'effective and coherent' application of the instruments and, therefore, constitutes a 'best practice', he or she is encouraged to mention this as such.

²⁸ Case 584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, ECLI:EU:C:2020:1002, para. 73.

²⁹ We will use the words 'issuing Member State' in a broad sense: the Member State that requests judicial cooperation or initiates judicial cooperation based on mutual recognition.

³⁰ Art. 22(1).

videoconference.³¹ Other investigative measures that can be requested by an EIO, such as search and seizure of evidence or hearing a witness, cannot function as an alternative and are, therefore, out of scope.

The three conventions do not as such impinge on the right to liberty of a suspect, accused or convicted person.³² Like Directive 2014/41, they are included insofar as they offer *alternatives* to measures that do involve deprivation of liberty.

The EU Convention on Mutual Assistance in Criminal Matters is only included insofar as it contains provisions concerning sending to and serving documents on a suspect, accused person or convicted person who resides abroad.³³ Summoning a suspect to an interrogation, an accused person to his trial or a convicted person to report to prison to undergo a sentence may already suffice to attain the goal pursued, thus obviating the need for employing forms of judicial cooperation that involve deprivation of liberty.

The CoE European Convention on the Transfer of Proceedings in Criminal Matters is included, because transfer of proceedings can serve as an alternative to surrender on the basis of an EAW or to recognition and enforcement of a sentence.³⁴

The CoE European Convention on Mutual Assistance in Criminal Matters is only included insofar as it offers a mechanism to achieve the result of a transfer of proceedings, without complying with the formalities of the CoE European Convention on the Transfer of Proceedings in Criminal Matters.³⁵ Moreover, not all Member States have ratified the CoE European Convention on the Transfer of Proceedings in Criminal Matters.³⁶

³¹ Art. 24(1).

³² The EU Convention on Mutual Assistance in Criminal Matters includes provisions on the temporary transfer of a person already held in custody for the purpose of investigative measures (Art. 9) and on hearing by videoconference (Art. 10), but these provisions are replaced by the corresponding provisions in Directive 2014/41/EU (Art. 34(1)).

³³ Art. 5.

³⁴ In certain circumstances, the CoE European Convention on the Transfer of Proceedings in Criminal Matters also applies when the person concerned has already been finally convicted. See *MR2.0: some preliminary explorations*.

³⁵ Art. 21(1) of the European Convention on Mutual Assistance in Criminal Matters : the ‘laying of information’ by one MS ‘with a view to proceedings in the courts of another’ MS.

³⁶ Germany and Poland are not bound by this convention.

The Protocol to the EU Convention on Mutual Assistance in Criminal Matters nor the Additional Protocols to the CoE Convention on Mutual Assistance in Criminal Matters are included. They do not contain forms of judicial cooperation that can serve as alternatives to measures involving deprivation of liberty.

It should be recalled that the provisions of the EU Convention on Mutual Assistance in Criminal Matters and the CoE European Convention on Mutual Assistance in Criminal Matters that are relevant to this project, were not replaced by the directive on the EIO (Directive 2014/41/EU).³⁷

1.1. Transposition of EU instruments

- (a) FD 2002/584/JHA;
- (b) FD 2008/909/JHA;
- (c) FD 2008/947/JHA;
- (d) FD 2009/829/JHA;
- (e) Directive 2014/41/EU.³⁸

Explain for each of these instruments whether your MS transposed them and, if so, whether in separate laws or as a part of the Code of Criminal Procedure.³⁹

³⁷ See Art. 34(1): ‘(...) this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions (...)’. The directive does not contain any provisions on sending to and serving documents on a suspect, accused person or convicted person who resides abroad, nor on the ‘laying of information’ by one MS ‘with a view to proceedings in the courts of another’ MS. That is so, because the directive is only concerned with obtaining evidence.

³⁸ FD 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ* 2009, L328/42 is not listed here. Although there are strong links with the conventions on transfer of proceedings in criminal matters (see 1.2 below), this framework decision does not regulate any form of judicial cooperation. Moreover, this framework decision only applies to parallel proceedings in more than one MS against the same person for the same acts.

³⁹ Incorrect transposition into national law *per se* is out of scope. Incorrect transposition is only relevant if it has an impact on the “effective and coherent” application of the instruments. If, e.g., the NAR is of the opinion that transposition of the optional grounds for refusal of Directive 2014/41/EU as mandatory grounds for refusal is in contravention of that directive *and has a negative impact on the “effective and coherent application” of instruments*, this is relevant and worthy of mention.

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.⁴⁰ This proposal will not be included in the country reports but the NARs will address the relevance of this proposal for effective and coherent application of the existing instruments in their analysis in the separate memorandum.

1.2. Ratification of conventions

- (f) EU Convention on Mutual Assistance in Criminal Matters;
- (g) European Convention on the Transfer of Proceedings in Criminal Matters;
- (h) European Convention on Mutual Assistance in Criminal Matters.

Explain for each of those instruments whether your MS ratified them. If not, explain why not. If so, explain whether your MS implemented them into national law and, if so, whether in separate laws or as a part of the Code of Criminal Procedure; also list any reservations and declarations your MS made that could have an impact on coherence.⁴¹

1.3. Competent (judicial) authorities and central authorities

1.3.1. Competent (judicial) authorities

- (a) FD 2002/584/JHA;
- (b) FD 2008/909/JHA;
- (c) FD 2008/947/JHA;
- (d) FD 2009/829/JHA;
- (e) Directive 2014/41/EU;
- (f) EU Convention on Mutual Assistance in Criminal Matters;
- (g) European Convention on the Transfer of Proceedings in Criminal Matters;
- (h) European Convention on Mutual Assistance in Criminal Matters.

Describe which (judicial) authorities are competent under each of those instruments.

⁴⁰ COM(2023) 185 final.

⁴¹ The CoE is in the process of analysing and reviewing reservations and declarations pertaining to its conventions.

Concerning FD 2009/829/JHA and FD 2008/947/JHA: explain how the condition of equivalence⁴² is met (Art. 3(2) of FD 2008/947/JHA; Article 6(2) of FD 2009/829/JHA) if the designated competent authority is not a ‘judicial’ authority. Also, if the designated competent authority is not a ‘judicial’ authority, explain the reasons for the choice.

Explain how the right to an effective remedy before a tribunal (Article 47(1) of the Charter) is guaranteed, if the competent authority is not a court.

1.3.2. Central authorities

Did your MS designate “central authorities” (within the meaning of the instruments)? If so, which authorities and what are their respective competences? What is the role of the central authority in choosing the form of cooperation?⁴³

1.3.3. Coordination

Are there any mechanisms (in law or in practice) for coordinating between:

- different (judicial) authorities that are competent under one and the same instrument/convention and;
- different (judicial) authorities that are competent under different instruments/conventions?

⁴² See *MR2.0: some preliminary explorations*, p. 16.

⁴³ It is assumed that the central authority has no role in deciding whether to ask for judicial cooperation, and if so, which form of judicial cooperation. However, if that assumption does not hold true for your MS, please explain.

2. The instruments and investigation/prosecution

General introduction

As discussed in the proposal, our perspective is the perspective of the competent national authority that has to decide whether or not to request judicial cooperation in a criminal case with a particular transnational component:

- either the person concerned resides in another Member State;
- or he⁴⁴ is a national or resident of another Member State (but present in the issuing Member State).

In order to establish (a lack of) coherence and effectiveness when applying the instruments, chapters 2 and 3 are divided according to the general goals pursued by the competent national authority: investigation/prosecution on the one hand (Chapter 2) and enforcement of a sentence on the other (Chapter 3). Chapters 2-5 correspond to elements I and II of the methodology.

As to Chapter 2, the goal of investigation and/or prosecution can only be pursued in the stages preceding the stage of enforcement of a sentence. Those stages are the pre-trial stage and the trial stage. Thus, the concept of “prosecution” includes the trial. It is not excluded that at the trial stage – and thus during “prosecution” – investigative measures (such as interrogating the defendant in another MS) are carried out.

The pre-trial stage comprises the investigation into an offence from the moment the authorities become aware that an offence has been committed (even when the probable author of that offence is not yet known) up to the decision that the probable author of the offence must stand trial. The trial stage starts from the moment the competent national authority decides that the person concerned must stand trial. It ends when the decision of a court to convict the person concerned and to impose a sentence on him becomes final and enforceable. It comprises, therefore, a trial on appeal. Proceedings in which only questions of law are addressed are excluded. During such proceedings, there is no need for forms of judicial cooperation that are

⁴⁴ With a view to readability, ‘he’ is used instead of ‘he/she/they’.

in the scope of the project, i.e. that are capable of prejudicing the liberty of the person concerned (see p. 6).⁴⁵

The chapter on investigation/prosecution is subdivided into:

- a general part, identifying *in abstracto* the instruments that can be employed to pursue the general goal of investigation/prosecution (i.e. their “applicability”) (2.1), and
- a specific part, identifying the considerations that play a role when deciding on whether to employ those instruments *in concreto* in the pre-trial and trial stages (2.2 and 2.3) in connection with more specific goals that are pursued (i.e. their “application” in a given case).

2.1. Applicability of the instruments according to EU law⁴⁶

In Section 2.1, the listed instruments are those that – in our preliminary view – apply to that particular stage from the of EU-law perspective. This means that in this stage national law and national arrangements are not relevant.⁴⁷

From the perspective of EU law, there are doubts regarding the applicability of some of the instruments listed.⁴⁸ These instruments are denoted by a question mark in red, like this: ‘FD 2009/829/JHA (?)’. The reason for the question mark is explained in red. The NARs will give their opinion on the applicability of those instruments from the perspective of EU law. Please refer to the case-law of the CJEU, national case-law, legal literature and national parliamentary debates where relevant.⁴⁹

⁴⁵ Of course, once the sentence is final it may be necessary to order the arrest and detention of the person concerned to ensure the enforcement of the sentence, but this concerns the enforcement stage, not the trial stage.

⁴⁶ Order of the instruments in accordance with sections 1.1 and 1.2.

⁴⁷ Considerations with regard to national law and arrangements are relevant when dealing with the application of instruments *in concreto*, therefore in Chapter 2.2 and 2.3.

⁴⁸ See also *MR2.0: some preliminary explorations*, p. 5-9.

⁴⁹ With regard to national sources: only insofar as they concern the applicability/the scope of the EU instrument.

2.1.1. Pre-trial stage

The pre-trial stage is subdivided into two parts:⁵⁰

- substage 1: the national authorities have reasonable grounds for believing that a certain person has committed the offence but cannot yet order his arrest and detention on remand under national law.
- substage 2: arrest and detention on remand are possible under national law.

Each of the two substages corresponds to a subsection: section 2.1.1.1 (substage 1) and section 2.1.1.2 (substage 2). Each of those subsections distinguishes between two situations: either the suspect is present in the issuing Member State or he is present in another Member State.

2.1.1.1. Substage 1 (no detention on remand possible)⁵¹

- (a) Person concerned present in issuing MS
 - FD 2009/829/JHA (?)
 - Directive 2014/41/EU
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- (b) Person concerned present in another MS
 - FD 2009/829/JHA (?)
 - DR 2014/41
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

⁵⁰ There is a third stage that precedes the two substages mentioned but that substage is out of scope (substage 0: the national authorities are aware that an offence has been committed but the probable author of that offence is unknown as yet). See the introduction to Chapter 1.

⁵¹ It may be that according to the law of some MS a reasonable suspicion of a sufficiently serious offence does not suffice for ordering detention on remand. In the Netherlands, for instance, there must be a “serious suspicion” (“ernstige bezwaren”) which is more than a reasonable suspicion.

FD 2009/829/JHA seems to require that detention on remand is possible as a precondition to issuing an ESO. After all, ESO is ‘an alternative to provisional detention’ (Art. 1). Is it possible under EU law to issue an ESO, if detention on remand itself is not possible?

Although an EAW, in general, can be issued in the pre-trial stage, it is not mentioned here, because in substage 1 it is not possible to order detention on remand.

2.1.1.2. Substage 2 (detention on remand possible)

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - FD 2009/829/JHA (?)
 - DR 2014/41
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is ‘an alternative to provisional detention’ (Art. 1 FD 2009/829/JHA). Does this mean that under EU law detention on remand must be ordered as a precondition to issuing an ESO subsequently?

- (ii) person in detention on remand
 - FD 2009/829/JHA
 - DR 2014/41
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- (b) Person concerned present in another MS
 - (i) detention on remand possible but not ordered
 - FD 2009/829/JHA (?)
 - DR 2014/41
 - EU Convention on Mutual Assistance

- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- (ii) detention on remand ordered
 - FD 2002/584/JHA (?)
 - FD 2009/829/JHA (?)
 - DR 2014/41
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

What is the view in your country on whether it is possible, under EU law,⁵² to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect/accused?

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

2.1.2. Trial Stage

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible⁵³ but not ordered
 - FD 2009/829/JHA (?)

⁵² At various places the Annotated Index requires the NARs to put forward their opinion on the applicability of certain instruments to certain substages, either as a matter of EU law or as a matter of national law. These are different questions. It may well be that a certain instrument does apply as a matter of EU law, but does not apply as a matter national law, and vice versa. It may also be that a certain instrument allows a MS to refrain from providing for a certain measure but that a MS has chosen not to make use of that option. The answer to such questions may show that there are defects – (in the former situation) or legitimate choices (in the latter situation) that stand in the way of “effective and coherent” application of the instruments (see p. 3).

⁵³ The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*). After all, detention on

- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is ‘an alternative to provisional detention’ (Art. 1 FD 2009/829/JHA). Does this mean that, under EU law, detention on remand must be ordered as a precondition to issuing an ESO subsequently?

- (ii) person concerned in detention on remand
 - FD 2009/829/JHA
 - DR 2014/41
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - FD 2009/829/JHA (?)
 - DR 2014/41 (?)
 - EU Convention on Mutual Assistance
 - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures

remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence. Consequently, proceedings concerning an offence which only carries a non-custodial sanction are out of scope.

concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

Although an EAW, in general, can be issued in the trial stage, it is not mentioned here, because detention on remand is not ordered.

Directive 2014/41 sets rules that apply to 'all stages of criminal proceedings, including the trial phase' (recital (25)). At the same time, these rules pertain to carrying out 'investigative' measures 'with a view to gathering evidence' (recital (25)).

Under Directive 2014/41, is a videoconference possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?⁵⁴

If not: is such a videoconference possible without issuing an EIO?⁵⁵ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?

Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

(ii) detention on remand ordered

- FD 2002/584/JHA⁵⁶
- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

⁵⁴ Cf. Case C-285/23.

⁵⁵ Cf. Case C-255/23.

⁵⁶ The ultimate objective of a prosecution-EAW is surrender to the issuing MS in order to conduct a criminal prosecution (which includes the trial stage). Pending the decision on the execution of a *prosecution*-EAW, FD 2002/584/JHA provides for two forms of intermediate judicial cooperation in connection with the prosecution in the issuing MS: hearing the person concerned in the executing MS by a judicial authority of that MS (Art. 18(1)(a) and Art. 19 FD 2002/584/JHA) or temporarily transferring the person concerned to the issuing MS to be heard there (Art. 19(1)(b) and (2) FD 2002/584/JHA).

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

Directive 2014/41 sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (recital (25)).

Under Directive 2014/41, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO?⁵⁷ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

2.2. Applicability and application of the instruments at the pre-trial stage according to national law

General introduction

In this section, the object is to tie instruments that are applicable *in abstracto* in the various (sub)stages of the pre-trial stage to *specific* needs for judicial cooperation.

This presupposes that the instruments that are applicable in abstracto according to both EU law (see paragraph 2.1) and national law. If there are applicability issues according to national law concerning the pre-trial stage, the NARs are requested to address them in this paragraph.

⁵⁷ Cf. Case C-255/23 and Case C-285/23.

Given our person based approach and given the focus on (alternatives to) measures concerning deprivation of liberty, in the pre-trial stage the specific needs for judicial cooperation are basically twofold:

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);⁵⁸
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution (whether or not he is present in the issuing MS).⁵⁹ This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.⁶⁰

However, as a safety-valve, we have included the option ‘(dd) other?’⁶¹

With regard to each substage and each subdivision of each substage (present in issuing MS/present in another MS; detention on remand not possible/detention on remand possible; detention on remand possible but not ordered/detention on remand ordered) the NAR will first describe which national authority is in charge of the investigation/prosecution at that stage and, with regard to each specific need for judicial cooperation, which national authority is competent to request that form of judicial cooperation at that stage.⁶² Please be as concrete as possible: do not just mention ‘the Public Prosecutor’s Office’ or ‘the court’, but specify to which tier of jurisdiction the competent authorities belong, e.g. ‘the Public Prosecutor’s Office at the first instance court’ or ‘the first instance court’ and, where relevant, specify their territorial competence, e.g. ‘the Public Prosecutor’s Office at the first instance court in X’ or ‘the first instance court in X’.

⁵⁸ (aa) concerns measures which require the presence of the person concerned, such as interrogation (whether or not by videoconference) or confrontation. For convenience’s sake, we will use ‘interrogation’ as a short hand designation.

⁵⁹ Later on, we will clarify why the situation in which the person is in the issuing MS is also taken into account.

⁶⁰ *E.g.*, by summoning the person concerned.

⁶¹ Not ‘(cc)’. That designation is reserved for something else. See the introduction to section 2.3.

⁶² Refer to the relevant provisions of national law and, if necessary, to national case-law in the footnotes.

The NAR will examine whether the competent national authority takes into account less intrusive alternatives when deciding on which form of judicial cooperation to request and which instrument(s) to apply. The NAR will describe in a factual way which considerations play a role⁶³ when the competent national authority has to take that decision. To that end, the NARs will (also) endeavour to ascertain whether:

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);⁶⁴
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;⁶⁵
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audio-visual transmission)/telephone conference to that end.

In the country report, only these considerations will be described. In a *separate* memorandum, the NAR will express his opinion on whether the decisions of the competent national authorities on the application of the various instruments are ‘effective and coherent’ (within the meaning of *MR2.0: some preliminary explorations*).⁶⁶ These four separate memoranda will, in turn, form the basis of the overarching analysis in the end report.

Some of the instruments are followed by a question mark in red. Those are the instruments whose applicability under EU law is under doubt (see 2.1). The NARs will provide their

⁶³ That means that at this point no normative approach as to which considerations should play a role should be used. The normative approach is reserved for the separate memorandum.

⁶⁴ *OJ* 2023, L 86/44.

⁶⁵ This calls for an exercise in thinking in scenarios: if the requested form of judicial cooperation does not achieve its intended result, what other form(s) of judicial cooperation will the issuing judicial authority then employ?

⁶⁶ See footnote 1

assessment regarding the applicability of those instruments within the framework of national law. Please refer to case-law of the CJEU, to national case-law and legal literature, where relevant. Also, refer to infringement proceedings against the NAR's MS, where relevant.

2.2.1. *Substage 1 (no detention on remand possible)*

- (a) Person concerned present in issuing MS
 - (bb) Ensuring that the suspect is available⁶⁷
 - FD 2009/829/JHA (?)
 - ESO possible under national law?**
 - (dd) Other (?)
- (b) Person concerned is present in another MS
 - (aa) Executing investigative measures/prosecution such as interrogating the suspect
 - DR 2014/41⁶⁸
 - Temporary transfer⁶⁹/videoconference**
 - EU Convention on Mutual Assistance
 - Inviting him for an interrogation or confrontation etc. (sending/service documents)**
 - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters
 - Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.**
 - (bb) Ensuring that the suspect is available
 - FD 2009/829/JHA (?)

⁶⁷ '(aa)' does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

⁶⁸ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

⁶⁹ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

ESO possible under national law?

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that the suspect is available for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option.

(dd) Other (?)

2.2.2. *Substage 2 (detention on remand possible)*

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered⁷⁰

(bb) Ensuring that the suspect is available

- FD 2008/829/JHA (?)

ESO possible under national law?

(dd) Other (?)

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures.

(b) Person concerned is present in another MS

(i) detention on remand possible but not ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- DR 2014/41⁷¹

⁷⁰ '(aa)' does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

⁷¹ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

Temporary transfer⁷²/videoconference

- EU Convention on Mutual Assistance

Inviting him for, e.g., an interrogation (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(bb) Ensuring that the suspect is available

- FD 2008/829/JHA (?)

An ESO is ‘an alternative to provisional detention’ (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

- EU Convention on Mutual Assistance

Keeping in contact with him while he’s abroad (sending/service documents)

- Convention on Transfer on Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(dd) Other (?)

⁷² It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

(ii) detention on remand ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- FD 2002/584/JHA (?)

Under national law, is it possible to issue a prosecution-EAW for the sole⁷³ purpose of interrogating the requested person as a suspect?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

- DR 2014/41⁷⁴

Temporary transfer⁷⁵/videoconference

- EU Convention on Mutual Assistance

Summoning him, e.g., to an interrogation while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for, e.g., interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

(bb) Ensuring that the suspect is available

- FD 2002/584/JHA

Prosecution-EAW

- FD 2008/829/JHA (?)

⁷³ It is rumoured that the issuing judicial authorities of one MS issue an EAW just to hear the requested person. After having heard the surrendered person, he is then released.

⁷⁴ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

⁷⁵ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

ESO possible under national law?

- EU Convention on Mutual Assistance

Keeping in touch with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

(dd) Other (?)

2.3. Applicability and application of the instruments at the trial stage according to national law

General introduction

In section 2.3, the various instruments will be linked to specific needs for judicial cooperation at the trial stage. The needs in this section are as follows:

(aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);⁷⁶

(bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution or ensuring his availability for the trial (whether or not he is present in the issuing MS). This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.

(cc) ensuring the suspect's presence at trial:

(dd) other (?)

⁷⁶ See the Introduction to section 2.2.

Nota bene: the trial stage is part of the investigation/prosecution phase. That is why (aa) is also included. As stated before, at the trial stage, and thus during “prosecution”, there may be a need for investigative measures.

What was said in the introduction to section 2.2 concerning the task of the NAR applies *mutatis mutandis* to this section. To be clear: applicability according to national law is only to be addressed if there are applicability issues.

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered⁷⁷

(bb) Ensuring that the suspect is available⁷⁸

- FD 2009/829/JHA (?)

An ESO is ‘an alternative to provisional detention’ (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention on remand is possible but not ordered, and, if so, under what conditions?

(dd) Other (?)

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures and availability for trial is ensured.

(b) Person concerned is present in another MS

(i) detention on remand possible but not ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

⁷⁷ In the pre-trial stage, we distinguish between situations in which detention on remand is not possible (yet) (substage 1) and situations in which it is possible (substage 2). That distinction is not repeated in the trial stage. We consider the relation between the pre-trial stage and the trial stage to be of a chronological nature. Since the trial stage follows substage 2 of the pre-trial stage, it is implied that detention on remand is possible during the trial stage. Of course, there may well be situations in which during the trial stage keeping the person concerned in detention is no longer possible, e.g. in case of undue delay. However, the perspective of this project is of a ‘regular’ criminal prosecution in which the precepts of Art. 5 and 6 ECHR are adhered to.

⁷⁸ ‘(aa)’ does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

- DR 2014/41⁷⁹ (?)

Temporary transfer⁸⁰/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?⁸¹ If not: is such a videoconference possible without issuing an EIO?⁸² Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

- EU Convention on Mutual Assistance

Inviting him for an interrogation (serving summons abroad)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for executing investigative measure/prosecution in the issuing MS, e.g. interrogation. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

⁷⁹ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

⁸⁰ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 8).

⁸¹ Cf. Case C-285/23.

⁸² Cf. Case C-255/23.

Is it possible under national law to issue an ESO, when the person concerned is in the MS of his lawful and ordinary residence and detention is not ordered?

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for ensuring that the suspect is available for executing investigative/prosecution measures nor for ensuring his availability for the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(cc) Ensuring the suspect's presence at trial

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence and no detention on remand is ordered?

- DR 2014/41 (?)⁸³

Is it possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer)?

- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

⁸³ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

Transfer of proceedings to the MS where the accused is present. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

(dd) Other (?)

(ii) detention on remand ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

- FD 2002/584/JHA

Prosecution-EAW. Is it possible under national law to issue a prosecution-EAW just to execute investigative measures, such as an interrogation?

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

- DR 2014/41⁸⁴ (?)

Temporary transfer⁸⁵/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?⁸⁶ If not: is such a videoconference possible without issuing an EIO?⁸⁷ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

⁸⁴ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

⁸⁵ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 8).

⁸⁶ Cf. Case C-285/23.

⁸⁷ Cf. Case C-255/23.

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

- EU Convention on Mutual Assistance

Inviting him, e.g., to an interrogation (serving summons abroad)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer proceedings to the MS where the accused is present. This is not an instrument that provides for executing investigative measures/prosecution in the issuing MS, e.g. an interrogation in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(bb) Ensuring that the suspect is available

- FD 2002/584/JHA

Prosecution-EAW

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence?

- EU Convention on Mutual Assistance

Keeping in contact with the person concerned while he is abroad (sending/service of documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present (in order for him to be present at the trial in that MS). This is not an instrument that provides for ensuring that a suspect is available for executing investigative measures/prosecution in the issuing MS, e.g. interrogation, nor for ensuring his availability for the benefit of the trial

in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(cc) Ensuring the suspect's presence at trial

- FD 2002/584/JHA

Prosecution-EAW

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is the MS of his ordinary residence?

- DR 2014/41 (?)⁸⁸

Is it possible under national law to employ an EIO for the purpose of ensuring the presence of the accused at the trial (either through a videoconference or a temporary transfer)?

- EU Convention on Mutual Assistance

Summoning the person concerned abroad

- European Convention on Transfer/European Convention on Mutual Assistance in Criminal Matters (?)

Transfer of proceedings. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

(dd) Other (?)

⁸⁸ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

3. The instruments and sentence enforcement

General introduction

The enforcement stage starts once the sentence imposed on the convicted person (custodial sentence/measure of deprivation of liberty, alternative sanction, probation decision) is final and enforceable.

As with Chapter 2, first, the instruments that are applicable to the enforcement stage *in abstracto* are listed (section 3.1), distinguishing between two situations: the person concerned is present in the issuing MS and he is present in another MS. Subsequently, in section 3.2 specific needs for judicial cooperation are tied to the various instruments. These needs are:

- (ee) enforcement in another MS;
- (ff) enforcement in the issuing MS (if the person concerned is present in another MS).

As with sections 2.2 and 2.3, the NAR will:

- describe which national authority is in charge of the enforcement stage and which national authority is competent to request judicial cooperation concerning enforcement of the sentence;
- address applicability issues according to national law if there are such issues;
- describe which considerations play a role when the competent national authority has to take a decision on requesting judicial cooperation and on which instrument(s) to employ.

In doing so, the NAR will take into account the list of considerations mentioned in the introduction to section 2.3 where applicable, *viz.* whether

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);⁸⁹

⁸⁹ OJ 2023, L 86/44.

- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;⁹⁰
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audiovisual transmission)/telephone conference to that end.

In addition to those considerations, the NAR will take into account whether ‘composite sentences’ (sentences composed of unconditional deprivation of liberty and conditional deprivation of liberty present problems.⁹¹

3.1. Applicability of the instruments or conventions according to EU law

(a) Person concerned is present in issuing MS

- FD 2008/909/JHA
- FD 2008/947/JHA
- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

It is possible under EU law to ‘divide’ composite sentences and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?

(b) Person concerned is present in another MS

- FD 2002/584/JHA
- FD 2008/909/JHA
- FD 2008/947/JHA

⁹⁰ This might require thinking of different scenarios. For instance, what if the sought-after instrument for judicial cooperation does not result in the desired outcome? To what alternative form(s) of judicial cooperation will the issuing authority resort to?

⁹¹ In the Netherlands, e.g., the courts can impose the following sentence: a sentence of four years deprivation of liberty, of which two years will not be enforced as long as the person concerned complies with certain conditions during a probation period of three years.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

It is possible under EU law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?

3.2. Applicability and application of the instruments and conventions according to national law

- (a) Person concerned is present in issuing MS

(ee) enforcement in another MS⁹²

- FD 2008/909/JHA

Enforcement of a custodial sentence

- FD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters (?)

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to recognise the sentence?

It is possible under national law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

- (b) Person is present in another MS

(ee) enforcement in another MS

- FD 2008/909/JHA

Enforcement of a custodial sentence

- FD 2008/947/JHA

Enforcement of an alternative sanction/a probation decision

⁹² As the person concerned is present in the *issuing* MS, enforcement in the *issuing* MS does not require judicial cooperation.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to surrender the person concerned and refuses to recognise the sentence?

It is possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

(ff) enforcement in issuing MS

- FD 2002/584/JHA

Execution-EAW with regard to a custodial sentence

4. Anticipating the application of instruments: sentencing

This Chapter is the odd one out. It concerns a stage in which cooperation is not yet necessary. However, at the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. Unlike the previous two chapters, the focus is on a stage of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish whether in sentencing an accused person who is a national of another Member State or who resides in another Member State, judges take into account the (im)possibilities of judicial cooperation with regard to enforcement of that sentence, should the need arise. In other words, whether in sentencing judges anticipate possible needs and problems related to judicial cooperation,⁹³ as well as whether national law allows them to do so.

At least two issues are of interest here:⁹⁴

- *Conditional sentences and probation decisions*⁹⁵ and *alternative sanctions*.⁹⁶ Is the fact that the accused person resides in another Member State a factor in determining whether to impose a specific sanction, especially if a person residing in the issuing Member State would receive a similar sanction for comparable offences?
- *composite sentences* (see the introduction to Chapter 3). Does the fact that such sentences are governed by two different judicial cooperation regimes – and, consequently, that enforcing such sentences in another Member State may cause difficulties – play a role in deciding whether or not to impose such a sentence?

⁹³ So this chapter is, unlike the chapters 2 and 3, not about applying instruments itself but about anticipating possible problems in the future with applying instruments.

⁹⁴ We invite the NARs to identify and include other issues.

⁹⁵ See the definition of both in Art. 2(3) and (5) of FD 2008/947/JHA.

⁹⁶ See the definition in Art. 2(4) of FD 2008/947/JHA.

5. Miscellaneous: whereabouts unknown and *in absentia*

This Chapter is also an odd one out. It concerns stages in which cooperation is not sought or in which it is not necessary yet. When making decisions about going to trial and informing the suspect of the date and place the whereabouts of the accused may be unknown. When the whereabouts are known and he is abroad, whatever a Member State does may have consequences for asking for cooperation now or at a later stage. At the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. As in the previous Chapter, the focus of this last one is on stages of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the stage of preparations for the trial and the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish what decisions authorities take in seeking the whereabouts of the accused. Not knowing the whereabouts of the suspect is a problem, because it means that the authorities do not know what measures are possible and with whom cooperation must be sought. Do they ask for information from other states, do they introduce a Schengen-alert, do they issue an EAW or do they simply wait? There is very little known at this early stage and especially not on whether and if so, what instruments of cooperation are used.

Depending on national criminal procedure, a Member State may or may not have the possibility to conduct trials in the absence of the accused. It would be relevant to know to what extent judges consider the pros and cons of asking for cooperation when taking a decision on the summons of the accused as well as on whether or not to proceed to trial without the accused present.

At least two issues are of interest here:⁹⁷

⁹⁷ We invite the NARs to identify and include other issues.

The summons to an accused abroad may be sent directly by mail without any assistance from the Member State in which the accused resides. It may also be sent with the assistance of its authorities. The former may be faster, the latter may give more certainty about whether the accused received the summons and wishes to be present at the trial. Is this a matter that is considered by courts? To what extent does the choice for one or the other relate to the (im)possibility the national system may have to conduct proceedings in the absence of the accused? Is it considered that if the accused is in the other Member State, whether a transfer of proceedings might be more appropriate in this case?

There is a follow-up question to that. When taking the decision to allow *in absentia* proceedings to be held, does the judge consider that the *in absentia* character of the proceedings may have consequences when later international cooperation is needed? For example: FD 2002/584/JHA applies other, more severe, conditions to such judgements than to other judgments.



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