Strengthening of International Cooperation in Criminal Matters: Extradition and Mutual Legal Assistance

Report of the Council of Europe Online Conference – 5 May 2021

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

On 5 May 2021, the Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) hosted an online conference under the auspices of the German Presidency of the Council of Europe (CoE). It had the aim of strengthen-ing international cooperation in criminal matters. Erik Verbert, president of PC-OC, delivered the welcome address, which was followed by opening speeches from Jan Kleijssen, director of the CoE's Directorate of the Information Society and Action against Crime, and Dr. Margaretha Sudhof, State Secretary of the German Federal Ministry of Justice and Consumer Protection. During the morning session, the conference consisted of insightful expert interventions on current is-sues in mutual legal assistance (MLA). The afternoon session was devoted to extradition and split into three workshops held in parallel. Member States and representatives from third countries engaged in productive discussions and a valuable exchange of views.

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CITATION SUGGESTION

L. Breulich, "Strengthening of International Cooperation in Criminal Matters: Extradition and Mutual Legal Assistance", 2021, Vol. 16(4), eucrim, pp281–284. DOI: https://doi.org/10.30709/eucrim-2021-021

Published in
2021, Vol. 16(4) eucrim pp 281 – 284
ISSN: 1862-6947
https://eucrim.eu

I. MLA: Cooperation between CoE and EPPO

After an introduction to the European Public Prosecutor's Office (EPPO), explaining both its structure and remit, current challenges were addressed. The EPPO is able to render MLA if it is already in possession of relevant information or evidence, but it can neither extradite persons nor ask for a surrender or an extradition. Safe communication within the EPPO and between delegated prosecutors in the EU Member States was identified as a crucial issue. An alternative to encrypted emails – which no longer meet contemporary standards – could be a secure cloud. This solution would allow for sharing of documents and enable safe communication between the EPPO members.

An outlook into the future of the office included plans to extend the competence of the EPPO to terrorism and to create a European criminal court. The discussion was marked by scepticism concerning the necessary specialisation of the prosecutors and the sensitivity of the area of state protection. One obstacle to the establishment of a European criminal court was seen in Art. 86 TFEU, which does not provide for such an extension, making amendments to the EU treaties necessary.

Next, the legal framework for cooperation between third countries (both within and outside the CoE) and the EPPO was presented. With regard to the rule of speciality, the issue of transfer of evidence was raised. If MLA is provided to a European delegated prosecutor or the EPPO, state authorities must be made aware that the EPPO has access to the information in its entirety and that evidence will be presented to the court competent in the specific matter. This competence may differ from the jurisdiction originally assumed when MLA was requested. The responding state could, however, make the provision of evidence subject to the condition that no such transfer takes place. In this case, the country in which the trial is conducted would have to send a new request to the responding state. If no such condition is imposed, the EPPO may use evidence where it is needed.

Another issue within the context of cooperation between third countries and the EPPO concerned the interpretation of Art. 104 (6) of Regulation (EU) 2017/1939 ("the EPPO Regulation"), which states that both sides must mutually support each other. The question was raised as to whether this includes the possibility of exchanging information spontaneously, for example if the EPPO seizes a computer and coincidentally finds evidence of other crimes outside its jurisdiction. As it is committed to the principle of legality, the EPPO would have to inform the relevant authorities in the event of such findings.

Switzerland gave its perspective, namely that at the international level a legal basis for cooperation with the EPPO has been lacking. It would hence be supportive to create a new legal instrument for cooperation with the EPPO within the framework of the CoE. A representative of the US Department of Justice announced that US authorities will cooperate with the EPPO as well as the Department's intention to render MLA when requested.

In the ensuing debate, the conference participants discussed the following:

- Whether the courts that hear EPPO cases may be considered EU courts (and cases cannot be considered national), or:
- Whether EPPO procedures remain national, since they follow national requirements with national prosecutors before national courts.

https://doi.org/10.30709/eucrim-2021-021

The latter approach is particularly questionable if proceedings would eventually be heard before a European criminal court sometime in the future. In this case, the current system would have to be revised, but it seems likely that the EPPO would still use national structures.

II. Extradition

1. Effects of detention conditions on extradition

The first workshop analysed the legal basis in extradition cases, addressing the effects of detention conditions in the requesting state on extradition.

First, the approach of the European Court of Human Rights (ECtHR) to detention conditions was discussed. Since *Soering v UK,*[1] a CoE member state could be in breach of a convention right when surrendering an individual if the authorities had been aware that that person may be subject to inhuman treatment in the requesting state. This decision motivates states to examine the conditions in another (non-member) state. A summary of the principles and requirements for detention facilities can be found in *Muršić v. Croatia.*[2]

Secondly, the relevant legal framework of the EU and the authoritative interpretation of the law of the Court of Justice of the European Union (CJEU) were presented. The case *Aranyosi and Căldăraru*[3] was cited as having changed the legal landscape: in certain cases, it became imperative for executing EU Member States to assess detention conditions in the issuing state before surrendering the person requested.

This case law has had far-reaching consequences with regard to the numerous challenges encountered by practitioners. In particular, delays resulted because of the executing state's duty to assess the conditions in the issuing state. One of the difficulties is determining the detention facility in which the person will eventually be detained and finding objective, reliable information on that facility. Concerns were raised about the usefulness of reports drafted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as their publication could be rejected by countries that do not agree with its content. Another point of discussion was whether a person extradited on the basis of assurances could be transferred to a prison with worse prison conditions upon the request of the person himself/herself, even though this would mean a breach of assurances.

Yet another problematic issue that was discussed concerned the different approaches by judicial authorities towards both the type of information requested and the structuring of information being sent back to the executing judicial authorities. The lack of a common understanding of acceptable minimum standards for detention conditions and the lack of consensus on what constitutes sufficient information or assurance leave a wide margin of discretion to national courts.

The issue of discriminatory treatment of prisoners was also raised. A person that is being transferred has to be treated in line with EU human rights standards, but prisoners not subject to EU cross-border instruments do not necessarily benefit from these standards.

Possible solutions include the development of a common methodology and common criteria for the assessment of detention conditions. The EU Agency for Fundamental Rights' Criminal Detention Database, which contains information on detention facilities in Member States that is objective, reliable, specific, and properly updated, could help in assessing prison conditions. Having a similar database within the CoE on the basis of the 1959 European Convention on MLA would also be useful. With regard to financial support for member states with inadequate prison conditions, it was left open as to how this could be financed. Reducing detention altogether and finding alternative cooperation methods other than the hard-to-monitor assurances could be a further part of the solution.

2. Effects of CJEU case law on extradition

The second workshop addressed the CJEU's case law and its effect on extradition. In the *Petruhhin* case,[4] the CJEU introduced the obligation to carry out a consultation procedure between the requested EU Member State and the EU Member State of nationality of the EU citizen being sought by a third country. The CJEU stated that it would constitute unequal treatment and a restriction of freedom of movement if an EU Member State does not extradite its own citizens but extradites those of another EU Member State. A justification for this restriction could be prevention of the risk of impunity. However, the CJEU has found that European criminal law provides for more proportionate means, such as a surrender to the state of nationality by means of an EAW and that this instrument is to be given priority over the extradition request of the third country. When discussing the *Petruhhin* judgment, the question arose as to how the decision should be applied in individual cases, i.e. what kind of information should be provided.

In the *Raugevicius* case,[5] the CJEU confirmed that the *ne bis in idem* principle may be an obstacle with regard to persons who are subject to an extradition request. The CJEU maintains that those persons should serve their sentences in the Member State of their nationality in accordance with the 1983 CoE Convention on the Transfer of Sentenced Persons, with an exception for long-term residents, who should also be able to serve their sentence in the requested state.

Lastly, reference was made to two recent cases. Case C-505/19 (*WS v Germany*), pending at the time, concerns the scope of the *ne bis in idem* principle within the Schengen area and its relation to Interpol red notices from third countries; the opinion rendered by the Advocate General was welcomed.[6] Case C-398/19 ("*BY*")[7] was presented to show the possibility of extraditing a person to a third country if that person is a national of another EU Member State and if the other state does not issue an EAW in a reasonable time.

In the context of the US perspective, concerns were raised with regard to the development of the case law of the European Court of Justice on extradition. The participation of a non-Member State in CJEU proceedings is not provided for in the court's rules of procedure. The USA would neither be allowed to see written submissions of the disputing parties nor participate in the proceedings, whereas the US Supreme Court is open to the participation of other states. The role of the European Commission (EC) was also criticised. The EC would usually participate in all extradition cases before the CJEU. When asked to extradite a person to a Member State, the USA would do everything in its power to facilitate the extradition. Before the CJEU, however, the EC would intervene for the sake of harmonising EU law, taking an unfavourable stance towards extradition. Therefore, the USA wishes to enter into a dialogue with the EC before it takes a position before the CJEU that might affect the USA.

Another issue put forward by the USA concerns the obligation for EU Member States to treat citizens of other Member States like their own nationals. If the state of nationality asks for the return of a person, this state receives priority according to the *Petruhhin* mechanism. If the state does not extradite its own nationals, there is no way for the USA to have the person extradited. The USA is also concerned about the *ne bis in idem* rule: if a person has been prosecuted in an EU Member State and then travels to another Member State, *ne bis in idem* applies and the person cannot be extradited. This would have an adverse effect on extradition. In the extraditions treaties the USA has with different Member States, previous prosecution in the requested state only is laid down as one reason for a refusal to extradite. The CJEU created grounds for refusal, however, that the USA did not agree to, amounting to a breach of *pacta sunt servanda*. The US extradition treaty with the EU does not state, namely, that a ground for refusal would be the prosecution of the requested person in another EU state. In conclusion, the USA would like to engage in a dialogue with the EU on whether there is a way to bring the considerations of third states before the CJEU and work together with the EC and the Member States in order to apply their extradition treaties.

Next, the joint report of Eurojust and the European Judicial Network (EJN) on the extradition of EU citizens to third countries[8] was presented. The aim of the report was to gather information on the practical experience of national judicial authorities in the area of extradition to third states and to identify the most relevant issues in this regard. The EJN and Eurojust identified uncertainties as to the scope of the CJEU's case law with regard to the Member States' obligations on extradition as well as practical and legal issues concerning the consultation procedure, such as:

- The identification of competent authorities in the Member State of nationality;
- Time limits for prosecution;
- Questions of jurisdiction or conflicts stemming from obligations under EU law versus those from extradition treaties;
- The results of the consultation procedure, which often do not lead to the prosecution of the person in his/her state of nationality.

Eurojust underlined its readiness to help identify competent authorities, to speed up the process, and to clarify the practical and legal extradition issues the Member States are facing. With regard to the consultation procedure, it was clarified that this obligation only arises if there is a legal basis for extradition, if the requested Member State prohibits the extradition of its own nationals, and if the requested person made use of the right to free movement.

Representatives from several CoE member states participated in the discussion that followed, expressing their reservations about the *Petruhhin* judgement. The Netherlands and Portugal claimed that the *Petruhhin* case was not the correct way to handle the situation in question. There will always be cases where issuing an EAW is not possible, rendering the Member State unable to protect its own citizen. According to Israel, the judgment widens the scope to non-extradition of a fugitive requested by a third state. Reciprocity in terms of extradition would be merely theoretical, because third countries would extradite while EU Member States would not. Finland interjected that the scope of application of the *Raugevicius* decision is narrow. The problem is that states need the requesting state's permission to enforce the sentence of the person in their own state and such permission is not always granted.

It was also put forth that the EC has no role in extradition cases, as extradition lies within the competence of the EU Member States. The US representative claimed that the decision in *Pisciotti* (the first extradition case involving the USA)[9] was wrong, as it ignored the extradition agreement between the USA and the EU.

The importance of improving the dialogue between the EU and third countries was once again highlighted. The similarity between US extradition requests and EAWs would be striking, and it was surprising that the CJEU violates international law by establishing a priority for EAWs. There were no positive interventions regarding the *Petruhhin* decision, which is lacking guidance on how to apply it. Third countries will be confronted with the negative effects of EU law and are lacking any possibility to intervene in proceedings before the CJEU. In conclusion, further clarification through CJEU judgments on the extradition of EU citizens to third countries would be helpful for practitioners.

3. Lessons learned from the COVID-19 pandemic

In the third workshop, three expert presentations shed light on the effects of the COVID-19 pandemic on international cooperation in criminal matters. The need for a comprehensive digitalisation of international cooperation in criminal matters was identified as the main lesson learned. The use of digital solutions, e.g. to transmit requests electronically, should not be limited to times of crisis but instead become the new norm.

From the perspective of the United Nations Office on Drugs and Crime (UNODC), a broad variety of technical solutions is already available that can ensure the secure electronic transmission of requests, including secure platforms created by judicial bodies or bilateral/multilateral channels between states.

Eurojust reported on its work, which involves regularly updating the information received and making it available to practitioners. This includes a casework report for practitioners[10] and a compilation of information, gathered together with the EJN, on the impact of COVID-19 on cooperation in criminal matters in the EU.[11]

With respect to surrender procedures, the issuing of EAWs continued largely as usual throughout the pandemic. A prioritisation (e.g. of serious cases) took place in some Member States. As regards the execution of EAWs, confinement measures led to delays and difficulties regarding the actual surrender of requested persons. In many cases, Eurojust served as a go-between channel in negotiations between states, for example to reach an agreement on new surrender dates. With respect to the legal dimension of delays caused by the pandemic, the FD EAW allows for exceptions from the time limits set, but there is still uncertainty over which of the following provisions applies:

- Art. 17(7) ("exceptional circumstances");
- Art. 23(3) ("circumstances beyond control");
- Art. 23(4) ("serious humanitarian reasons").

Eurojust also noted that Member States regularly request supplementary information on conditions in the issuing state according to Art. 15(2) FD EAW, e.g. regarding quarantine measures.

A study conducted by the international cooperation network Red de Cooperación Penal Internacional (RED-COOP), which resulted in the drafting of a guide on good practices developed by the Ibero-American Association of Public Prosecutors (AIAMP), was presented.[12] The study highlighted that electronic transmission of requests was much more efficient for both MLA and extradition, saving both time and money, while at the same time being at least as secure as the paper-based process. Measures to further increase transmission safety should include the use of institutional e-mail addresses, instead of personal e-mail addresses. The use of electronic signatures was also recommended to ensure that the identity and content of the message remain unaltered, thereby securing the authenticity of a request. This means of transmission is considered compatible with international law, as it has not been prohibited by any conventions. Some conventions even encourage the use of electronic transmission, e.g. Art. 25 of the Budapest Convention. Some states already allowed and started using electronic transmission years before the pandemic. One example of a current regional instrument is the Treaty of Medellin.

Sometimes, judges had to release persons from extradition custody because of the uncertainty over when borders would reopen, and surrender could take place. Sanitary measures, which require proper coordination, were also mentioned as an important aspect of protecting the person and officers concerned.

The discussion afterwards touched upon digitalisation, in general, and the technical and legal issues surrounding the electronic transmission of requests, in particular. Data protection was a major concern. A system based on a cloud can be problematic because the storage of information would be in the hands of the cloud provider. One possible solution would be the use of bilateral or multilateral channels that cannot store information but only digitally transmit the data. Ordinary e-mail would even be possible using encryption systems and commercial authenticity certification systems. To facilitate this, the provider needs to be registered in the state in which it is operating. Some argued in favour of digitalisation because there are no conventions at the international level explicitly requiring requests to be transmitted by mail or by courier.

Paper-based documents do not grant any greater reliability than electronic transmissions, as signatures can be falsified. As a basis for future electronic transmission, it would be useful to start looking at domestic case law, where courts have accepted evidence gathered abroad and transmitted it digitally.

It was agreed that there is no "one-size-fits-all" solution but that solutions instead have to be developed on a case-by-case basis through direct consultations between the authorities involved. Detention prior to extradition was mentioned as being a key issue. It was reiterated that a surrender should be carried out as soon as possible (e.g. by land instead of by air or by using military aircraft), whenever possible. The time a person spends in extradition detention must be limited. Alternatives to detention that are less prejudiced to the requested person's fundamental rights but similarly effective should be explored, including house or night arrest.

III. Outlook for the Future of International Cooperation in Criminal Law

After the CoE conference, the CJEU delivered its judgment in Case C-505/19, *WS v Germany,* on 12 May 2021.[13] Essentially following the opinion of the Advocate General, the CJEU decided that extradition is part of law enforcement in the requested state and therefore covered by *ne bis in idem*. Treaties with third countries cannot interfere, as they are inapplicable if they contain obligations that are not in line with EU law. The judgment calls for a legal remedy that allows the person affected to obtain a final judicial decision establishing that the *ne bis in idem* rule applies. This decision still requires implementation in most EU Member States.

Primary EU law supersedes any bilateral international treaties contradicting EU law. If necessary, these treaties need to be amended in order to strengthen cooperation with third countries and to restore trust in international cooperation in criminal matters on the basis of treaties.

In regard to the digitalisation of international judicial cooperation, existing instruments often already allow for electronic submission, but countries do not always make use of this possibility in practice or even accept only paper-based requests. The solution could be the initiative launched by the European Commission to modernise cross-border judicial cooperation in the EU.[14] This initiative included a public consultation (that was open for feedback until mid-May 2021), which aims to make digital judicial cooperation the default option by means of a legislative proposal by the end of the year.

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1. ECtHR, 7 July 1989, *Soering v United Kingdom*, Applic. no. 14038/88.↩
2. ECtHR, 20 October 2016, *Muršić v. Croatia*, Applic. no. 7334/13.↩
3. CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*; see also *eucrim* 1/2016, 16.↩
4. CJEU, 6 September 2016, Case C-182/15, *Petruhhin*; see also *eucrim* 3/2016, 131.↩
5. CJEU, 13 November 2018, Case C-247/17, *Raugevicius*; see also *eucrim* 4/2018, 203-204.↩
6. AG Bobek, Opinion of 19 November 2020 in Case C-505/19, *WS v Germany* (see also *eucrim* 4/2020, 287-288).↩
7. CJEU, 17 December 2020, Case C-398/19, *BY*; see also *eucrim* 4/2020, 289.↩
8. <https://www.eurojust.europa.eu/joint-report-eurojust-and-ejn-extradition-eu-citizens-third-countries>; see also *eucrim* 4/2020, 288. All hyperlinks referred to in this article were accessed on 1 October 2021.↩
9. CJEU, 10 April 2018, C-191/16, *Pisciotti v Germany*; see also eucrim 1/2018, 29.↩
10. <https://www.eurojust.europa.eu/impact-covid-19-judicial-cooperation-criminal-matters>.↩
11. <https://www.ejn-crimjust.europa.eu/ejn/EJN_DynamicPage/EN/86>; see also the article by Radu/Ernest, *eucrim* 2/2021, 114-116.↩
12. Available in Spanish only: <http://www.aiamp.info/index.php/grupos-de-trabajo-aiamp/cooperacion-juridica-internacional/documentos/buenas-practicas-de-los-miembros-de-la-aiamp-ante-covid-19>.↩
13. See also *eucrim* 2/2021, 100-101.↩
14. <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/digitalisation-cross-border-judicial-cooperation_en>.↩

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union