SESSION 3

Case-law of CJEU in criminal matters:
Which lessons learnt for the EIO?

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Eurojust has published an Overview on the Case Law of the Court of Justice of the European Union (CJEU) on the European Arrest Warrant (EAW).

“It is a practical guide for the use of EU Member States’ judicial authorities that are involved in the judicial response to cross-border crime. It can facilitate the consistent and effective application of the EAW throughout the European Union”
1. What if there is a contradiction or inconsistency between national and EU law?

C-105/03 – Pupino – 16 June 2005

- Italy
- Misuse of disciplinary measures
- Hearing of minors
- Preliminary enquiry stage vs adversarial stage
- Special Inquiry procedure
- Admissibility of evidence
- Framework Decision Victim Rights
1. What if there is a contradiction or inconsistency between national and EU law?

C-105/03 – Pupino – 16 June 2005

“Article 3 of the Framework Decision requires each Member State to safeguard the possibility for victims to be heard during proceedings and to supply evidence, and to take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings”
1. What if there is a contradiction or inconsistency between national and EU law?

C-105/03 – Pupino – 16 June 2005

“The national court must be able to authorize young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial”
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1. **What if there is a contradiction or inconsistency between national and EU law?**

C-105/03 – Pupino – 16 June 2005

“The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, *in the light of* the wording and purpose of the Framework Decision”
2. What if the other country has not implemented the EU instrument?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

- Romania, Germany
- German EAW for robberies based on several national arrest warrants
- German EAW law declared **unconstitutional**
- Reciprocity as a requirement / refusal ground?
2. What if the other country has not implemented the EU instrument?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

“Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. […] The executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that framework decision.”
3. Does the EIO require the availability of a legal remedy in the issuing MS?

Article 14 (2) EIO - The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.
3. Does the EIO require the availability of a legal remedy in the issuing MS?

Case C 324/17 – Gavanozov – (lodged 31 May 2017)

- Referred by Bulgaria
- Are national legislation and case-law consistent with the EIO, in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing an EIO for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness?
3. Does the EIO require the availability of a legal remedy in the issuing MS?

Case C 324/17 – Gavanozov – (lodged 31 May 2017)

- Is the person who occupies the property in which the search and seizure was carried out or the person who is to be examined as a witness a concerned party within the meaning of Article 14(4) in connection with Article 14(2) of the directive??
4. What constitutes judicial cooperation?

- Cooperation between judicial authorities?
- Cooperation based on judicial decisions?
- Cooperation based on provisions relating to judicial cooperation (as opposed to police cooperation)?

For long the position of the European Commission was that the qualification of authorities belonged to the discretion of the individual member states.
4. What constitutes judicial cooperation?

- Cooperation between judicial authorities?
- Cooperation based on judicial decisions?
- Cooperation based on provisions relating to judicial cooperation (as opposed to police cooperation)?

The court concludes that it is an **autonomous EU concept** that should not be left to the sole interpretation of the individual MS. It is **not limited** to designating only to **judges or courts** of a Member State, but **may extend**, more broadly, to the authorities required to **participate** in administering justice in the legal system concerned.
5. Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

- Lithuania, The Netherlands
- Convicted for infliction of grievous bodily injury
- The Ministry of Justice of Lithuania issues an EAW
- Dutch District Courts questioned whether decision of MoJ qualifies as required judicial decision.
5. Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

“It must, however, be held that the term ‘judicial authority’, referred to in that provision, cannot be interpreted as also covering an organ of the executive of a Member State, such as a ministry; which would be in breach of the general principle of separation of powers; it would also not sufficiently guarantee that the procedural safeguards are met during the procedure.”
5. Can a Ministry of Justice be the competent authority to issue warrants?

C-477/16 – Ruslanas Kovalkovas – 10 November 2016

“It is accepted that a non-judicial authority, namely a central authority, is appointed for the transmission and reception of European arrest warrants. Action by such an authority is limited to practical and administrative assistance for the competent judicial authorities.”
6. Can a decision made by a police authority be used as the basis to issue European warrants?

C-452/16 – Krzystof M. Poltorak – 10 November 2016

- Sweden, the Netherlands
- SE convicted the Polish national for infliction of grievous bodily injury
- The Swedish police board issued an EAW
- The District Court in Amsterdam questioned whether a warrant issued by a police board qualifies as a judicial decision in the sense of article 1 FD EAW
6. Can a decision made by a police authority be used as the basis to issue European warrants?

C-452/16 – Krzystof M. Poltorak – 10 November 2016

“It must, however, be held that the term ‘judicial authority’, referred to in that provision, cannot be interpreted as also covering the police services of a Member State”
6. Can a decision made by a police authority be used as the basis to issue European warrants?

C-453/16 – Halil Ibrahim Özçelik – 10 November 2016

- Hungary, the Netherlands
- Hungarian District Court issued an EAW
- In the annex, reference is made to the national arrest warrant of the Police Department of Ajka, **confirmed by** decision of the **Public Prosecutor’s Office of Ajka**.
6. Can a decision made by a police authority be used as the basis to issue European warrants?

C-453/16 – Halil Ibrahim Özçelik – 10 November 2016

“A confirmation, such as that at issue in the main proceedings, by the public prosecutor’s office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a ‘judicial decision’, within the meaning of that provision.”
7. Can a temporal effect be granted for the ECJ caselaw on the competent authorities?

C-452/16 – Krzysztof M. Poltorak – 10 November 2016

“During the hearing, the Netherlands Government and the European Commission requested the Court to limit the **temporal effects of the present judgment**, should the Court find that a police service, such as the Swedish police board, is not covered by the term ‘judicial authority’, within the meaning of Article 6(1) of the Framework Decision.”
7. Can a temporal effect be granted for the ECJ caselaw on the competent authorities?

C-452/16 – Krzystof M. Poltorak – 10 November 2016

“It is apparent inter alia from the evaluation report of the Council of 21 October 2008, that the Council has, in the past, criticised the issue of arrest warrants by the police service at issue in the main proceedings as incompatible with the requirement of designating a ‘judicial authority’.”
8. Can a decision of a non-criminal court / actor be executable via the European criminal warrants?

C-60/12 - Marián Baláž – 14 November 2013

- Czech Republic, Austria
- Road Traffic Offences – appeal possible in court that “also” deals with criminal cases
- Balaz argues that it does not qualify as a “court having jurisdiction in particular in criminal matters”
8. Can a decision of a non-criminal court / actor be executable via the European criminal warrants?

C-60/12 - Marián Baláž – 14 November 2013

“The term ‘court having jurisdiction in particular in criminal matters’, set out in Article 1(a)(iii) of the Framework Decision, is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure.”
Art. 11.1 – List of optional grounds

(a) immunity or privilege
(b) ordre public ‘narrow’
(c) would not be authorized in similar national “administrative / infringement”–case
(d) ne bis in idem
(e) territoriality clause
(f) violation of Art 6 TEU & Charter
(g) double criminality
(h) severity-thresholds

(g) and (h) not for minimum investigative measures that have to be available (e.g. all non-coercive measures)
9. Can a member state add or rephrase refusal grounds to implement in line with the national criminal policy and (constitutional) provisions?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

- Romania, Germany
- EAW for robberies
- Mr Radu submitted that the authorities of the executing MS were obliged to ascertain whether the fundamental rights were being observed in the issuing MS. If that was not the case, the execution of the EAW refused, even if that ground is not expressly provided for

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9. Can a member state add or rephrase refusal grounds to implement in line with the national criminal policy and (constitutional) provisions?

C-396/11 – Ciprian Vasile Radu – 29 January 2013

“Member States may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 thereof and in the cases of optional non-execution listed in Articles 4 and 4a. [...] The executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in Article 5 of that FD
9. Can a member state add or rephrase refusal grounds to implement in line with the national criminal policy and (constitutional) provisions?

**Financial capacity**
- MLA vs MR philosophy
- Costs borne by the executing Member State
- Exceptional costs -> consultation & discussion
- Alternative: cost-sharing-mechanism
  - Cost efficiency
  - Accumulation of ‘small costs’
9. Can a member state add or rephrase refusal grounds to implement in line with the national criminal policy and (constitutional) provisions?

**Operational capacity**

- New aut exequii aut tolerare rule?
- Art. 9.4
  - Request of IMS needs to be complied with
  - Unless against fundamental principles
10. Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?


- Portugal, France
- Convicted for drug trafficking in PT
- Mr Lopes Da Silva Jorge subsequently moved to France → resident status
- Optional ground limited and made mandatory
10. Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?


“That ground for optional non-execution has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires”
10. Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?


“Although a Member State may, in transposing Article 4(6), decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory.”
10. Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-579/15 – Daniel Adam Popławski – 29 June 2017

- Poland, the Netherlands
- PL national convicted to prison sentence in PL. PL issues EAW with a view to execution
- NL wants to refuse based on residence
- Refusal = de facto impunity?
10. Can a member state decide to implement optional refusal grounds included in the EU instruments as mandatory refusal grounds?

C-579/15 – Daniel Adam Popławski – 29 June 2017

*Legislation of a Member State providing that its judicial authorities are, in any event, obliged to refuse to execute an EAW in the event that the requested person resides in that Member State, without those authorities having any margin of discretion, […] cannot be regarded as compatible with that framework decision*
11. Can a member state oppose the abandonment of the double criminality requirement?

C-303/05 – Advocaten voor de Wereld – 3 May 2007

- Belgium
- Motion for annulment of EAW law
- Abandonment requirement is discriminatory
- List of 32 offences breaches legality principle
11. Can a member state oppose the abandonment of the double criminality requirement?

C-303/05 – Advocaten voor de Wereld – 3 May 2007

“Article 2(2) of the Framework Decision is not invalid inasmuch as it does not breach Article 6(2) EU or, more specifically, the principle of legality of criminal offences and penalties and the principle of equality and non-discrimination”
### Refusal Grounds

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<td>Article 2 (b), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
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<td>Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.</td>
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<td>0201 02</td>
<td>Knowingly participating in the criminal activities, without being a director</td>
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<td>Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime</td>
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<td>Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed.</td>
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<td>Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.</td>
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12. Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if the prior conviction is not yet executed?

C-129/14 – Zoran Spasic – 27 May 2014

- Germany, Italy, Austria
- Organised fraud, counterfeit banknotes
- IT conviction: prison & fine
- “fine paid” so sentence in the course of being executed?
- Ne bis in idem: article 50 Charter vs 54 CISA
12. Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if the prior conviction is not yet executed?

C-129/14 – Zoran Spasic – 27 May 2014

“CISA which makes the application of the ne bis in idem principle subject to the condition that, upon conviction and sentencing, the penalty imposed ‘has been enforced’ or is ‘actually in the process of being enforced’, is compatible with Article 50 of the Charter of Fundamental Rights of the European Union, in which that principle is enshrined.”
12. Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if the prior conviction is not yet executed?

C-129/14 – Zoran Spasic – 27 May 2014

“Article 54 CISA must be interpreted as meaning that the mere payment of a fine by a person sentenced by the self-same decision of a court of another Member State to a custodial sentence that has not been served is not sufficient to consider that the penalty ‘has been enforced’ or is ‘actually in the process of being enforced’ within the meaning of that provision.”
13. Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if additional conviction based on another qualification is possible in any of the other member states?

C-261/09 – Mantello – 16 November 2010

- Italy, Austria, Germany
- IT arrest warrant referring to participation in a criminal organisation & cocaine trafficking
- IT conviction for unlawful possession of cocaine, intended for resale
- Arrest in AT based on outstanding arrest warrant
13. Can a prior conviction for the same acts be ignored – and thus investigation and prosecution in another member state continued – if additional conviction based on another qualification is possible in any of the other member states?

C-261/09 – Mantello – 16 November 2010

“The concept of the ‘same acts’ also appears in Article 54 of the CISA, where it has been interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected”
14. Can MS decide what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

- Italy
- Member of European Parliament
- Insulting police officer at hospital parking lot
- Outside EP buildings
- Connection with performance of duties?
14. Can MS decides what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

“A statement of an MEP beyond the precincts of that institution and giving rise to prosecution does not constitute an opinion expressed in the performance of his duties covered by the immunity unless that statement amounts to a subjective appraisal having a direct, obvious connection with the performance of those duties.”
14. Can MS decides what does and does not fall within the scope of execution of political duties?

C-163/10 - Aldo Patriciello – 6 September 2011

“It is for the court making the reference to determine whether those conditions have been satisfied in the case in the main proceedings.”
Questions and discussion
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