



European Institute of Public Administration  
European Centre for Judges and Lawyers



## **Seminar 2: The pre-Lisbon instruments: Special focus on the European Arrest Warrant**

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Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice. Institutional Processes and Topical Areas



### ***Overview of the EU Criminal Justice area before the Lisbon Treaty***

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## Overview of the EU Criminal Justice area before the Lisbon Treaty

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### Table of contents

- 1 Institutional framework before the Lisbon Treaty
- 2 Mutual recognition and criminal procedure
- 3 Criminal jurisdiction, coordination and prosecution
- 4 Substantive criminal law
- 5 Evaluation

## Institutional framework before the Lisbon Treaty

- **3rd pillar of the EU police and judicial cooperation in criminal matters (TEU 29-42)**
  - intergovernmental pillar, not 'Community method'
- **decision-making**
  - Unanimity in Council, limited involvement of the EP, MS right to initiate
- **form of legislative acts**
  - EU law as opposed to Community law, framework decision, decisions, international conventions
- **legal effect of acts adopted**
  - no direct effect, no supremacy
- **jurisdiction of the Court of Justice of the European Union**

## EU criminal law

- **Mutual recognition and criminal procedure**
- **Criminal jurisdiction, coordination and prosecution**
- **Substantive criminal law**

## Mutual recognition and criminal procedure

### ▪ Basic principles of mutual recognition

- 1999 Tampere conclusions principle of mutual recognition
- 2000 mutual recognition work programme
- features of the principle of mutual recognition
  - replace or supplement CoE Conventions
  - form: Framework Decisions
  - terminology: issuing and executing state (instead of requesting and requested state)
  - traditional grounds of refusal have been abolished: dual criminality (32 offences), political crime, military offences
  - Remaining grounds of refusal: territoriality, de minimis rules, ne bis in idem, age of criminality, lapse of time, lis pendens, immunity, amnesty
  - standard clause for human rights
  - technical rules for processing requests

## Legislation adopted – criminal procedure

### ▪ Extradition and the European Arrest Warrant

- extradition: basic element of cooperation in criminal matters, an agreement between states to send a person to another state to serve a sentence or to face criminal trial, since he/she is absent in a criminal trial or following the imposition of a criminal sentence there
- EAW largely replaces former bilateral and multilateral extradition treaties
- EAW is the flagship mutual recognition measure, which is the most widely applied

### ▪ Pre-trial measures

### ▪ Post-trial measures

## Pre-trial measures

- **Movement of evidence**
  - Mutual assistance in criminal matters
  - European Evidence Warrant
  - (European Investigation Order)
  - Criminal records
  
- **Freezing orders**
  
- **Recognition of pre-trial supervision orders**

## Post-trial measures

- **Enforcement of sentences**
  - Financial penalties
  - Custodial penalties
  
- **Consequence of convictions**
  
- **Disqualification**
  
- **Confiscation orders**
  
- **Probation and parole**
  
- **(European Protection Order)**

## Evaluation

- **before the Treaty of Lisbon: no express legal base relating to**
  - evidence law
  - suspects and defendants
  - victims of crime
- **changes brought by the Treaty of Lisbon**
  - express treaty base
- **legislation planned/adopted after the Treaty of Lisbon**
  - European Investigation Order
  - Procedural Rights 'series'
    - Measure A Right to translation and interpretation
    - Measure B Right to information
    - Measure C Right to a lawyer
    - Measure D Right to Communication with Relatives, Employers and Consular Authorities
    - Measure E Special Safeguards for Suspected or Accused Persons who are Vulnerable
  - Victim protection package

## Criminal jurisdiction, coordination and prosecution

- **allocation of criminal jurisdiction**
  - conflicts of jurisdiction
  - transferring proceedings
  - Preventing cross border double jeopardy
- **operational support from Eurojust**

## Legislation adopted – criminal jurisdiction

- **Asserting jurisdiction**
  - no legislation (as opposed to cooperation in civil matters)
  - traditional grounds for criminal jurisdiction are used which overlap
  - specific substantive criminal law rules contain rules on criminal jurisdiction
- **Conflicts of jurisdiction**
  - Framework Decision on conflicts of jurisdiction
- **Transfer of proceedings**
  - no EU legislation
- **Double jeopardy**
  - Article 54 and 55 of the Schengen Convention
  - no coherent secondary EU legislation
  - specific ne bis in idem clauses in specific EU criminal law instruments
  - questions on the application of the double jeopardy principle are often referred to the CJEU
- **Coordination: Institutionalized form: Eurojust (European Public Prosecutor's Office)**

## Evaluation

- **Asserting jurisdiction**
  - specific substantive criminal law rules contain rules on criminal jurisdiction will do, however there is no clear no systematic approach
- **Conflicts of jurisdiction**
  - Framework Decision on conflicts of jurisdiction
  - experiences
- **Transfer of proceedings**
  - no EU legislation
- **Double jeopardy**
  - no coherent approach
  - evolving case law of the CJEU
  - human rights aspect
- **Eurojust**
  - how to make it more effective
  - (European Public Prosecutor's Office)



## Substantive criminal law

- **definitions of criminal offences**
- **traditionally a matter for the State, yet willingness to have common definitions with respect to serious crimes**
- **enhances criminal cooperation as weakens the barrier caused by the double criminality rule, as there is a common definition**
- **address not only the definition of offences but also general part of criminal law: attempt/complicity, liability of legal persons, harmonized sentencing rules**

## Legislation adopted – criminal jurisdiction

- **offences**
  - **terrorism,**
  - **trafficking in human beings**
  - **child pornography and prostitution**
  - **drug trafficking,**
  - **money laundering,**
  - **corruption,**
  - **counterfeiting of means of payment,**
  - **computer crime**
  - **organised crime**



▪ **scope of offences**

- liability of legal persons
- inchoate offences
- complicity
- possession
- omission

▪ **conditions of criminal liability**

▪ **defences**

▪ **penalties**



▪ **Problem of 1st and 3rd pillar legislation**

▪ **measures adopted under the 1st pillar**

- racism and xenophobia
- facilitation of illegal entry and stay
- employment of irregular migrants
- environmental crime
- protection of EU financial interests

## Evaluation

- **piecemeal legislation**
- **problem of cultural, social, economical differences resulting in conflicting views as to what actions should be criminalized**
- **justifying EU action becomes more difficult**

## General evaluation

- **EU criminal law legislation is most successful in the traditional field of judicial cooperation**
  - European Arrest Warrant being the centrepiece
- **evolving procedural safeguards, victims protection**
- **question whether rules on obtaining evidence are really missing**
- **Ne bis in idem is a clear systematic problem**
- **EU substantive criminal law reaching its limits**
- **more effective involvement of Eurojust**



**Do You Have  
Any Questions?**  
We would be happy to help.



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