

# The internal-external nexus: Cross-border criminal justice

by Florian Trauner and Auke Willems

Criminal justice is a sensitive area for transnational and international cooperation. States have different legal traditions and court systems, and perceptions of what is ‘just’ differ widely. In light of all this, the extent to which criminal justice cooperation has deepened – both within Europe and in the EU’s external relations – is quite remarkable. The EU and the US, for instance, have found ways to deal with potentially conflictual issues (including capital punishment) and deepened bilateral cooperation well beyond the initial focus on extradition and mutual legal assistance – into areas such as cybercrime, countering violent extremism and foreign fighters.

## Inside: using the European Arrest Warrant

The EU has embarked on ever-closer cooperation in criminal justice matters as a response to the increase in cross-border crime facilitated by the borderless Schengen regime and single market-related economic freedoms. With the introduction of the principle of mutual recognition as the core governance principle in the late 1990s, criminal justice cooperation has since become one of the fastest growing fields of EU integration (it was notably the UK that initiated the transfer of the principle of mutual recognition from the internal market context to the area of criminal law).

Put simply, mutual recognition requires member states to accept judicial decisions taken in other jurisdictions across the EU. It is widely assumed that the principle would not work without mutual trust between the judicial authorities of member states.

Mutual recognition represents a compromise between those member states willing to engage in deeper cooperation in this area and those reluctant to do so. Integration-reluctant states consider mutual recognition as a way to enhance the efficiency of criminal law cooperation while refraining from harmonising the different legal systems. By contrast, integration-willing member states accept it as an alternative to slow and cumbersome legislative procedures. Ultimately, mutual recognition can lead – and has led – to some degree of harmonisation in both procedural and substantive criminal legislation.

The principle of mutual recognition is now pervasive in EU criminal law. The Union has adopted instruments covering all stages of the criminal procedure, including pre- and post-trial (for example, the recognition of supervision measures, the enforcement of financial penalties, and the gathering and exchange of evidence). Its flagship instrument is the European Arrest Warrant

(EAW), which applies mutual recognition to extradition. Additionally, the EU has developed infrastructure in support of the Union's criminal justice activities: Eurojust and the European Police Office (Europol) are coordinating bodies designed to assist the member states in fighting cross-border crime, while the European Anti-Fraud Office (OLAF) has independent investigative competence in relation to the fraudulent use of EU funds.

The EAW has overhauled the intra-European extradition regime. Long in the pipeline, its eventual adoption was accelerated by the 9/11 attacks in the US, which led to an agreement within six months. In force since January 2004, the EAW abolished the right for states to exempt their own citizens from extradition – an important novelty as the handing over of nationals to other states used to be refused by most governments.

Moreover, it partially abolished the dual criminality rule, according to which an act shall not be extraditable unless it constitutes a crime in both jurisdictions – i.e. the requesting and the requested state. The EAW set strict and short time limits for extradition requests, which 'shall be dealt with and executed as a matter of urgency'. Extradition proceedings under the EU regime are of a summary nature, implying that they are based on a standardised form and not on the evidence underlying an individual warrant. The executive has been removed from extradition proceedings, and judicial instead of political actors have been put in charge.

With speedier procedures and more (successful) extradition requests, the EAW was quickly hailed as a success. It was also enforced against terrorist suspects in 2004 after the Madrid bombings, in 2005 after the London attacks, as well as after the November 2015 atrocities in Paris. A recent example is the extradition of Salah Abdeslam, the prime suspect of the Paris attacks, from Belgium to France. His lawyer's challenge of the extradition order was unsuccessful as, under the EAW, anyone who commits a serious crime in the EU can be sent back to the country where the crime took place in order to face trial there.

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However, the instrument also sparked a number of controversies relating to the different fundamental rights standards and practices of member states *vis-à-vis* criminal suspects and the automaticity with which an extradition request was processed. One example is a so-called trial in absentia, where the defendant is not present. This

is standard practice in some member states, but not in others. When a person is convicted in absentia, some states refuse to act on an extradition request – something that was not foreseen by the institutional architects of this instrument and that ultimately required a legislative amendment.

Moreover, due to a lack of a proportionality benchmark, some national prosecutors have issued EAWs for petty crimes and caused frustration in other member states. And issues such as the abolition of the dual criminality rule and the end of the nationality exception have led to a number of judicial challenges. Although the Court of Justice of the European Union ultimately upheld the legality of the EAW when it was asked to adjudicate on the matter, there have been a string of cases in which the Court has slowly granted member states more leeway in deciding on extradition requests, particularly when fundamental rights are at stake.

The EU legislator has also sought to address these concerns, in particular since the entry into force of the Lisbon Treaty (2009). Not only does the Treaty define the ordinary legislative procedure as standard in EU criminal law, but it also provided new competences in the field of criminal procedure. Accordingly, the EU has started to harmonise defence rights. This has led to directives, *inter alia*, on the right to interpretation and translation in criminal proceedings, the right of access to a lawyer and of communication with third persons upon arrest. Harmonisation of criminal procedural safeguards is believed to foster trust between cooperating judicial authorities and improve the functioning of the EAW – and of the mutual recognition principle more generally.

### Outside: cooperating with Washington

Criminal law has also become an item in the EU's external relations, and cooperation with the US



stands out in terms of importance. Criminal law entered the transatlantic agenda as part of the intensified cooperation on justice and home affairs after the terrorist attacks of 9/11. At its centre are two framework agreements, one on mutual legal assistance and another on extradition – the first international criminal justice agreements ever concluded by the EU. They were initially framed as being part of the transatlantic security agenda to fight terrorism, but the criminal justice mandate eventually moved beyond its initial focus.

During the negotiation of these agreements, some of the fundamental differences between the EU and the US came to the fore, namely the death penalty. The EU had to deal with the implications of *Soering v. United Kingdom*, a 1989 landmark ruling of the European Court of Human Rights. It maintained that the extradition of a German suspect who was at risk of facing the death penalty in the US would imply a flagrant violation of Article 3 of the European Convention on Human Rights, ensuring the right against inhuman and degrading treatment. In order to facilitate negotiations, the Commission referred the responsibility for death penalty cases to the member state level and ‘informed’ the US that some member states may wish to have specific guarantees in this regard.

The extradition agreement allows for the condition that the death penalty, if imposed, will not be carried out (article 13). The member states considered that this safeguard meets the necessary requirements outlined in the *Soering* ruling. Human rights organisations remained critical, however, and pointed to the fact that there is no obligation for member states to set conditions or refuse extradition in death penalty cases. Although an extradited person may not be executed, he or she can still be sentenced to death. Another sensitive issue in the negotiations was the question of how to deal with terrorist suspects potentially brought for detention in Guantanamo Bay. The EU insisted that a human rights and fair trial clause be inserted in the preamble, which enables member states

to refuse extradition in cases of special courts or where they have concerns about the right to a fair trial.

The US, by contrast, was keen to include the double criminality rule in the extradition agreement, which provides a safeguard for the US whereby it does not have to extradite individuals for conduct that is not deemed particularly serious by its own standards. An area in which this is of relevance is hate speech, in particular online. Free-speech laws in the EU are generally more restrictive compared to the US (Germany’s ban on any kind of Nazi propaganda, for example). Therefore, European extradition requests relating to ‘cyberhate’ (hatred or incitement to violence expressed online) tend to be refused with a reference to the First Amendment of the US Constitution on free speech.

### The EU-US framework agreements

Both framework agreements are not intended to substitute existing bilateral arrangements. Rather, they are designed to add value to the member states’ existing treaty relationships with the US by setting the minimum standards required for a functioning extradition regime. Both parties – the US and the member state concerned – are free to set more detailed rules in bilateral negotiations (including greater human rights protection or higher thresholds). In fact, the EU-US extradition agreement requires an accompanying document between each member state and the US, indicating how the agreement has been applied in practice.

Hence, the US concluded 22 bilateral deals with individual member states, which amended and supplemented their existing extradition treaties. Bulgaria, Estonia, Latvia, Malta and Romania – the remaining five EU members – signed new stand-alone extradition treaties in accordance with the EU-US extradition agreement, which replaced their older bilateral ones. With the signature of both framework agreements on 25 June 2003, the process had lasted several years. The agreement on mutual legal assistance

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entered into force in October 2009, and the one on extradition in February 2010. The 28th member state, Croatia, joined the agreements after its accession to the Union in 2013.

In terms of substance, the EU-US agreements have streamlined and modernised the existing cooperation regime: the extradition agreement has defined – and widened – the scope of extraditable offences; it specifies how to exchange information, documents and transit rules; and the mutual legal assistance agreement provides the legal backing for a joint EU-US task force to combat terrorism and serious crimes – for instance through easier access to bank account information of criminal suspects. It also provides rules on how to protect personal data or request confidentiality provisions. Moreover, witnesses no longer need to cross the Atlantic but may testify via video conferencing.

The way in which the EU-US agreements have impacted on bilateral relations differs from one EU member state to another. In the cases of some EU member states, which already had well-functioning extradition treaties with the US for many years, the EU framework agreement has not substantially altered the bilateral patterns of cooperation and it has primarily streamlined and expedited the procedure. But in the cases of other member states, particularly those that negotiated new treaties, the agreement has had greater impact. Furthermore, the EU-US agreements have introduced modern techniques of communication and evidence gathering to transatlantic relations – an asset for all member states regardless of their history of bilateral criminal law relations with the US.

The framework agreements reflect awareness of the substantial differences between the European and US legal systems. Even if transatlantic cooperation is deepened, there is still a qualitative difference between what each of the two partners is willing to do internally and what they are prepared to do jointly. There is a different level of trust *between* EU member states and *between* US states when compared with transatlantic relations. US law enforcement authorities cooperate more closely internally (both at state-state and at federal-state level) than they do externally (with EU member states). For example, in US interstate extradition, states are neither bound by a double criminality requirement nor by a specialty rule, as they are in transatlantic extradition. The EU-US agreements are also less ambitious than cooperation within the EU on the basis of mutual recognition, as is the case with the EAW.

## Beyond Washington

The EU-US agreements on extradition and mutual legal assistance have set a precedent for external cooperation in criminal justice matters. The EU has now signed similar agreements with Japan, Iceland and Norway (the last two have yet to be ratified). The EU-Japan agreement on mutual legal assistance is of particular interest as it was not only negotiated in record time, but it is also the EU's first 'self-standing' mutual legal assistance agreement between the Union and a third country. This means that no additional bilateral agreements between Japan and individual EU member states are required. Since no such agreements were in place between Japan and individual EU member states, the added value of this agreement to the existing EU-Japan relations is therefore quite significant. Moreover, the agreement introduces some modern cooperation tools including the possibility to provide testimony through video conferencing, and the exchange of bank information.

It is likely that the list of countries with which the EU will conclude agreements on extradition and mutual legal assistance will further expand. In addition, the success of such agreements has also inspired a further deepening of existing relations in criminal justice and security matters. With the US, for instance, two new Europol-US agreements were signed in 2015 to improve cooperation on irregular migration and foreign fighters. Preventing jihadists from returning from Syria and Iraq has become an area of particular interest: the EU and US law enforcement authorities seek to identify those recruiting and facilitating the travel of foreign fighters and to cut their sources of income. Cybercrime, violent extremism, victims' rights and hate crime are now also other areas in which the EU and US are considering to extend cooperation.

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