European and International "Instruments" for Criminal Cooperation – the European Arrest Warrant, the Extradition Warrant and the International Arrest Warrant

NÉMETH, KATA*

ABSTRACT *The main objective of this study is to present the key differences between the instruments of international and European cooperation in criminal matters, which determine and significantly influence their effectiveness. Criminal cooperation is perhaps one of the youngest areas in the history of European integration which, despite its early puberty, has developed over the years, albeit with some adolescent stubbornness, into one of the most effective instruments of cooperation between the Justice and Home Affairs agencies of the Member States of the European Union. The study concludes that the current instruments of criminal cooperation have simplified and accelerated surrender procedures, especially in the area of organised crime, at the same time also points out that a number of challenges remain to be addressed, related to the independence of the judiciary and the judicial system in general, the question of mutual recognition as well as the fundamental debates on international and EU law and values, constitutional principles and further harmonisation measures. It also highlights that despite significant efforts, there are still gaps in terms of effectiveness, efficiency and coherence with other measures and the use of digital tools.*

KEYWORDS *criminal cooperation, European Arrest Warrant, extradition, extradition warrant*

1. Introductory thoughts

Criminal cooperation is a challenging area, both at the European level and in international relations, given the ideological understanding of all countries where national criminal law and the definition of the exercise of national criminal power are an integral part of sovereignty. Without exception, the Member States of the European Union – although defending it with varying degrees of intensity – consider *ius punendi*, that is national criminal law, as the ultimate bulwark of their sovereignty vis-à-vis the Union and have therefore insisted on regulating it exclusively through their internal law. Third countries take a similar view also regarding national criminal law as the cornerstone of

* PhD student, Pázmány Péter Catholic University, Doctoral School of Law and Political Sciences.

their sovereignty.[1] For these reasons cooperation between States in criminal matters has always been a "powder keg" however, more recently, in view of the war on the international front, it has become an "explosive" subject, particularly at international level, with a political charge. The question rightly arises on the relationship between the sovereignty of States and European and international criminal law, which turns the question around and focuses on the extent to which a State can be considered sovereign when it does not exercise its criminal law powers (investigation, prosecution, sentencing) autonomously but delegates them to a supranational organisation (ICC, OLAF, European Public Prosecutor's Office).[2]

In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control – punishments – it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large.[3] For examples of laws with specific national connotations topics like drug prevention[4], abortion, or euthanasia are often referred to.[5] This is one of the reasons why it is extremely difficult to establish a coherent European – and international criminal law regime in particular. The latter is perhaps not even possible.

With the expansion of international criminal law, a fundamental question of the study is how the conceptual elements of international criminal law can be reconciled with national concepts and national legislation, and how the elements of different national legislations can be harmonised with each other. The difficulty mentioned above often arises in both law enforcement and legislation, thus the challenge is to compare the different concepts of the various fields. Therefore, the primary aim of this study is to draw a distinction between the instruments of criminal cooperation and thus to provide help in their practical application. In line with its purpose, this paper is primarily based on a doctrinal analysis, but its practical significance requires the use of a comparative analysis methodology, with attention to the slightly different

[1] Compared to: Stephen D. Krasner, *Sovereignty: Organized Hypocrasy* (New Jersey: Princeton University Press, Princeton, 1999), 9–25.
See more: Valki László, "Mit kezd a szuverenitással a nemzetközi jog?", in: *A szuverenitás káprázata,* ed. Gombár Csaba and Kankiss Elemér, Politikai Kutatások Központja (Budapest, Korridor, 1996)

[2] Molnár Dalma, "A szuverenitás és az európi büntetőjog kapcsolata," *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica* XXXVI, no. 2 (2018): 240–263.

[3] Case C-440/05. [ECLI:EU:C: 2007:393] General Advocat Mazákopinion at Comm'n of the Eur. Cmtys. v. Council of the European Union, 2007. paragraph 67–69.

[4] See e.g., Council Framework Decision 2004/757/JHA of 25.10.2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, 2004 O.J. (L 335) 8 (Establishing elements of serious types of drug offences and allowing Member States to regulate on personal consumption issues)

[5] Christoph Safferling, "Europe as Transnational Law – A Criminal Law for Europe: Between National Heritage and Transnational Necessities," *German Law Journal* 10, no 10 (2009): 1383–1397.

practices of the Member States involved in European criminal cooperation and the occurrence of Brexit. The complexity of the subject also requires a partial comparative analysis of foreign judicial and legal literature based on primary sources. Also, further comparative analysis of the pre- and post-Brexit system of criminal cooperation between the Member States of the European Union and the United Kingdom is needed. The methodology of the research is qualitative, based on doctrinal analysis and comparative legislative interpretation through research on the substantive law and closely related literature. The study also attempts to explore through explanatory and systems analysis the cause-and-effect relationships that might lead to an effectiveness deficit in criminal cooperation in the current fragmented system. Ultimately, the study addresses the key question of how to improve the effectiveness of European cooperation in criminal matters as well, which is essential for the common interest of all Member States. The study also intends to make recommendations to improve the effectiveness of international criminal cooperation.

2. International cooperation in criminal matters

International criminal law is not an autonomous system created by a supranational body but a community of states themselves voluntarily relinquishing part of their sovereignty. It follows that it exists only if and for as long as states wish it to exist. The need for cooperation in criminal matters has a long history, but it is most closely linked to the trend towards globalisation and the internationalisation of crime, as the need to combat transnational crime in Member States and third countries has increased with the growth of cross-border and organised crime. The recent growth of cybercrime, the proliferation of online and offline fraud, and the typically transnational nature of commercial crime, which can be very diverse in its subject matter such as drugs, human beings, have all served to justify and require closer links between judicial authorities in different countries and the exchange of information and experience, which has evolved from cooperation, initially in the form of intergovernmental agreements, into a dynamic and institutionalised area. The vast majority of sovereign states have thus recognised that effective and efficient action against war crimes and crimes against humanity, and the above-mentioned organised transnational crime can only be taken through international cooperation, voluntary bilateral or multilateral international treaties or membership in various international organisations.[6]

The positive conditions for international cooperation in criminal matters are *reciprocity*, i.e. the partial or full obligation of states to cooperate, and *double incrimination*, namely the requirement that the act on which the request is based must be punishable under the law of both the requesting and the requested state. In Hungary, the applicable law that can be invoked by a court in the case of

[6] Compered to: The Constitution of Hungary Article Q. (2) paragraph and the decision of the Constitutional Court 3/1993. (X. 13.) and also 36/1996. (IX. 4.) ABH conceptual content.

criminal cooperation with a third country is Act XXXVIII of 1996 on International Mutual Legal Assistance in Criminal Matters (hereinafter referred to as Njbt.), which expressis verbis presupposes reciprocity and double incrimination in the case of mutual legal assistance[7], however Act CLXXX of 2012 on Criminal Cooperation with the Member States of the European Union (hereinafter referred to as EU Act.), which regulates European criminal cooperation in Hungarian law – and will be examined later – is not explicitly laid down in the Act as a general condition in relations between EU Member States.

One form of international cooperation is the *police/law-enforcement cooperation* with International Criminal Police Organisation (Interpol) as the leading international law enforcement and information organisation, which brings together 194 countries and whose effectiveness lies in communication through the Secure Information Exchange Network Application (SIENA). Interpol is an international intergovernmental organisation with a structure that includes the National Central Bureau (NCB). In the field of crime prevention, international cooperation aims at exchanging information, identifying and monitoring individuals, optimising and sharing databases between Interpol and foreign law enforcement agencies, conducting international searches through Interpol channels and ensuring the enforcement of extradition. In order to achieve the above goals, Interpol has a Computerised Criminal Information System (ICIS) which allows a wide range of information to be searched and helps to locate the names and addresses of criminals, banks, financial institutions and the bank accounts they use, as well as the legal entities involved in the crime. The Automated Search Facility (ASF) will allow Interpol and National Central Bureaus (NCBs) to electronically retrieve information from the database (e.g. images, fingerprints, DNA profiles), opening up an increasing area of electronic evidence, particularly in cybercrime.

The other form of international cooperation is *judicial cooperation*, which operates partly through mutual legal assistance based on international conventions and partly through the establishment of joint investigation teams (JITs). The "archetype" of international judicial cooperation[8] in criminal matters is *extradition* and the *international arrest warrant* on which it is based. As far as the normative background of the extradition procedure is concerned – since the listing and analysis of all bilateral international treaties between States would go beyond the scope of this study – the most prominent multilateral international treaties are the Council of Europe Convention on Extradition of 13 December 1957, signed in Paris on 13th of December 1957 (hereinafter referred to as the Paris Convention)[9] and its Additional Protocol, which although it does

[7] Nbjt. 5. § a)

[8] M. Nyitrai Péter, *Nemzetközi bűnügyi jogsegély Európában*. (Budapest: KJK. Kerszöv Kft. 2002), 219.

[9] Promulgated in Hungary: Act XVIII of 1994 on the proclamation of the European Convention on Extradition and its Additional Protocols, signed in Paris on 13 December 1957.

not recognise the concept of the international arrest warrant, regulates the extradition procedure in detail. Modern national criminal law and international law require that the following principles be respected in extradition matters: the principle of reciprocity, the principle of double criminality, the principle of non bis in idem and the principle of specificity. These principles help to protect the sovereignty, independence, equality and prestige of States in international relations. They also promote to protect the human rights and freedoms of the person to be extradited.[10]

In the case of cooperation in criminal matters with a third country, it is only appropriate to issue an international arrest warrant as a law enforcement authority of a Member State in case the accused person has left for and is staying in a third country. Where criminal proceedings are to be brought against a suspect who is abroad and who is extraditable and where the material gravity of the crime justifies it, the court may issue an international arrest warrant.[11] The discretionary power of the court to decide whether it is necessary to issue an international arrest warrant – on the basis of the seriousness of the offence alone – will prevent situations in which a wanted person arrested in a foreign State solely on the basis of an international arrest warrant will be detained abroad without justification, following his arrest on the basis of an international arrest warrant – if Hungary does not ultimately submit an extradition request on the basis of minor material gravity of the offence. Moreover, the significant potential for human rights violations inherent in this problematic situation can be eliminated. An international arrest warrant may be issued by the investigating judge prior to indictment, by the trial judge after indictment, and by the judge executing the sentence after the final conclusion of the criminal proceedings, for the purpose of executing a custodial sentence or measure involving deprivation of liberty finally imposed on the accused, which implies that prosecutors and investigating authorities are not entitled to do so.[12] A request for extradition on the basis of an international arrest warrant must be accompanied either by the original or by a certified copy of the judgment establishing guilt and imposing the sentence, or by the arrest warrant, or by any other instrument having equivalent effect issued in accordance with a procedure laid down by the law of the requesting Party. The Minister of Justice decides on the request for extradition and notifies the court that previously issued the international arrest warrant of his decision. An important safeguard is that if the Minister of Justice does not make a request for extradition, the international arrest warrant must be immediately revoked by the court.[13] It is in the interests of the suspect that, if the extradition request is granted, the period of detention

[10] Arta Bilalli-Zerdeli, "Extradition it's nature and scope in criminal matters," *JUSTICIA International Journal of Legal Sciences*, no. 7 (2019): 33–43.
[11] Nbjt. 32. § (1)
[12] Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces From the ICTY to the ICC," *Journal of International Criminal Justice*, no. 4 (2006): 202–218. mqi086 202..218 (silverchair.com).
[13] Njbt. 33. § (1) – (2)

abroad on the basis of the extradition request should be included in the sentence imposed by the court.[14] While the trend in the issuance of international arrest warrants has been unimpeded, the effectiveness of the extradition procedure is far from guaranteed. In international cooperation in criminal matters the obstacles to effective extradition and cooperation are often the grounds for refusal. Only some of these obstacles can be mentioned in this paper for reasons of space limitations:

Extradition can be refused or even denied, if it is imposed for a political offence[15] with the spirit of liberalism behind, which protects those from political persecution who fight against tyranny in a country. An exception to the above reason is the so-called *'attentat clause'*, whereby an attempt on the life of a head of state is not considered a political offence and therefore does not prevent extradition. In practice, extradition is often made difficult or impossible by the diplomatic protection afforded by the principle of *non-refoulement*, under which, extradition requesting states often seek diplomatic assurances that the person to be extradited will not be subjected to persecution, death penalty, life imprisonment, inhuman conditions of detention or a fair trial. Bearing in mind that in practice this is an obstacle to extradition in many cases. The ECtHR's practice has also considered whether this is in fact a guarantee or an empty diplomatic promise on the part of States.[16] Among the grounds for refusal that can be invoked in extradition proceedings based on an international arrest warrant, the case of a *national citizen* should be highlighted. A Hungarian citizen may be extradited only if the person wanted is also a citizen of another state and does not reside in Hungary.[17] However, there are exceptions to this rule if certain conditions are met.[18] While in international criminal cooperation the ground for refusal is the extradition of a Hungarian national to another state for the purpose of prosecution or execution of a sentence, the significant innovation of the European Arrest Warrant was that it broke through this ground for refusal and removed the discretion of the Minister of Justice, by using a different terminology for extradition - although some would argue that there is only a semantic difference between *'surrender'* and *'extradition'*[19] . By using the word ‘surrender’, the decision is placed entirely in the hands of the

[14] Nbjt. 36. §

[15] Mark Mackarel and Susan Nash, “Extradition and the European Union,” *The International and Comparative Law Quarterly* 46, no. 4. (1997): 948–957.

[16] See e.g. Chahal v. United Kingdom (1996) case https://hudoc.echr.coe.int/eng?i=001-58004.

[17] Nbjt. 13. § (1).

[18] Nbjt. 13. § (2) – (3).

[19] Compered to Vö. Zsuzsanna Deen-Racsmány, “Lessons of the European Arrest Warrant for Domestic Implementation of the Obligation to Surrender Nationals to the International Criminal Court,” *Leiden Journal of International Law*, (2007): 190. https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/lessons-of-the-european-arrest-warrant-for-domestic-implementation-of-the-obligation-to-surrender-nationals-to-the-international-criminal-court/3A1BBEDFB9CDDB36431A8744D1EFE5F1.

court, allowing surrender to take place at national level and thus making European criminal cooperation much more effective.
In this context, the International Criminal Court (ICC) recently issued an international arrest warrant for Russian President Vladimir Putin, based on the facts set out in the indictment against the Russian President and the Russian Ombudsman for Children's Rights for the mass deportation of civilians. These acts fall under the category of war crimes in the ICC's international arrest warrant, but in the view of many – including the author of this paper – the acts charged could be other international crimes, whether crimes against humanity or – if several other circumstances are proven – genocide. At the same time, Russia's defence saying that a humanitarian evacuation is/was taking place should also be taken into account, and this will have to be clarified in the evidentiary proceedings before the ICC, which will depend on the success of the international arrest warrant and the extradition of the accused for prosecution before the ICC.

3. Hybrid forms of criminal cooperation - the extradition warrant

There is a specific form of cooperation in criminal matters with European countries that are not or are no longer members of the European Union. One specific element of criminal cooperation is the *extradition warrant*, which has the characteristics and features of both international criminal cooperation and European criminal cooperation, making it a hybrid legal instrument. An extradition warrant can only be issued for extradition from Hungary to certain other countries – the United Kingdom, the Republic of Iceland or the Kingdom of Norway and vice versa – if the available evidence indicates that the suspect is present in these countries or if the extradition request comes from these countries. The role and frequency of provisional extradition has increased significantly since the UK's exit from the European Union, in other word Brexit.
A person present in Hungary may be arrested, detained and extradited on the basis of an extradition warrant issued by a judicial authority of the United Kingdom, the Republic of Iceland or the Kingdom of Norway in respect of a person present in the territory of the European Union for the purpose of criminal proceedings, the execution of a custodial sentence or a detention order. An extradition warrant is to be considered as an extradition request,[20] i.e. in this respect it shares the fate of an international arrest warrant and an extradition request issued by a third country, but it differs significantly from "over-politicised" international criminal cooperation in that it is not the Ministry that decides on extradition, but the Metropolitan Court of Budapest – which has exclusive jurisdiction – and if the conditions for extradition are met, the Metropolitan Court of Budapest orders the arrest and extradition of the suspect by means of a non-adjudicatory order.[21] It is important to note that a provisional

[20] Nbjt. 36/A. § (2).
[21] Nbjt. 36/B. § (1) és (2)

arrest order can only be issued after a final decision on the extradition issue has been taken, in order to ensure that the purpose of extradition, namely the surrender of the person wanted, can be properly secured.[22] A request for provisional arrest for extradition purposes may also be made through the international police cooperation channel or through the International Criminal Cooperation Centre (hereinafter referred to as : ICICC), which acts as the Hungarian contact point for Interpol. The so-called "red corner" or "red notice" has become a common and standard form at the procedure of Interpol. An extradition warrant, thus results in a hit in the Interpol Find system, on the basis of which the arrested person must be produced, his or her detention must be ordered and ICICC arranges for the wanted person are to be brought before the Metropolitan Court of Budapest.

In the case of international "public offenders", it is often the case that several different types of arrest warrants have been issued for the same suspect, both in number and in form, i.e. the warrants compete with one another. If there is a conflict between a European arrest warrant and an extradition warrant issued for the same suspect and if the conditions for execution are met for more than one State, the Metropolitan Court of Budapest will decide which warrant is to be executed, taking into account all the circumstances. The immanent criteria of the assessment are the material gravity of the offence(s) and the place where it was committed, as well as the order and purpose of the warrants.[23]

The revival of the use of the extradition warrant was mainly indicated by Brexit, although the UK was no stranger to its distance from the EU in the field of criminal cooperation, as it did not exercise the opt-out under Protocol 21 to the TFEU[24] – unlike Ireland and Norway – but it regularly exercised the opt-in right and all relevant EU instruments on judicial cooperation in criminal matters applied to the UK, which has radically changed with Brexit. It should be borne in mind that on leaving the EU, the UK became a third country in its relations with the EU. Extradition has always been the cornerstone of international criminal cooperation between states, so the most important question for criminal cooperation was what would happen to the most frequently used instrument of criminal cooperation between member states – that is the European Arrest Warrant also known as "*informalised" extradition* – once the transition period was over.[25] The somewhat protracted exit negotiations eventually led to the conclusion of the Trade and Cooperation Agreement between the parties, which created a dual system in the area of criminal cooperation, further complicating existing forms of criminal cooperation. In

[22] Jancsó Gábor, "Nemzetközi elfogatóparancs, ideiglenes kiadatási letartóztatás iránti kérelem - a nemzetközi és a hazai jogi fogalmak összeegyeztethetőségének kihívásai," *Fontes Iuris*, no. 2 (2022): 22.

[23] 36/B. § Nbjt. (4).

[24] Treaty on the Functioning of the European Union https://shorturl.at/Gg0t4.

[25] Berczeli Sándor, "Az Európai Unión belüli büntetőjogi együttműködés aszimmetriája - avagy a többsebességes EU megvalósulása a büntetőjogi együttműködés területén," *Büntetőjogi Szemle*, no. 1 (2024): 19–24.

fact, Brexit represented a step backwards in the relationship between the two parties, as the relationship between the UK and EU Member States in relation to mutual legal assistance requests and the exchange of information from criminal records reverted to a pre-EU instrument, namely the 1959 Treaty of Strasbourg. The EU and the UK have been governed by the provisions of the European Convention on Mutual Assistance in Criminal Matters since 20 April 1959, however for example the Council Framework Decision 2008/909/JHA[26] will no longer apply to the enforcement of a custodial sentence based on the principle of mutual recognition and will instead have to refer to the Convention on the Transfer of Sentenced Persons of 21 March 1983, Strasbourg. However, despite these shortcomings, it can be concluded that the instruments and the organisational framework developed in the framework of EU cooperation in criminal matters have been sufficiently effective for the United Kingdom and that it was not in the interest of either party to establish a less effective new system of relations or even to revert entirely to international conventions without EU instruments, mainly concluded under the auspices of the Council of Europe, which would not effectively fill the gap left by the EU instruments.
The effectiveness of the European arrest warrant is demonstrated by the European Union's agreement with Norway and Iceland, which establishes a surrender procedure very similar to the European Arrest Warrant for two countries that are not members of the Union, thus eliminating the multi-level decision-making and time-consuming formalisation of the extradition procedure.[27]

4. European cooperation in criminal matters - the European Arrest Warrant

Criminal cooperation was initially not covered by European (Community) integration because it is undoubtedly the most sensitive aspect of EU policy in the area of freedom, security and justice, which Member States are prepared to abandon only as a last resort in order to defend their sovereignty.[28] At the end of the 1990s, the European Union recognised that it would not be effective in the fight against cross-border crime without closer international cooperation in criminal matters.[29] Many believe that the EU's criminal cooperation was based on the recognition that the common market could be threatened by terrorism, drug trafficking, international fraud and other transnational crimes and that Member States should therefore come to an agreement at a higher level rather

[26] Council Framework Decision 2008/909/JHA https://shorturl.at/4DWMP.
[27] Berczeli, "Az Európai Unión belüli büntetőjogi együttműködés aszimmetriája," 22.
[28] Horváth Zoltán, *Kézikönyv az Európai Unióról* (Budapest: HVG-ORAC, 2007), 511-512.
[29] Blaskó Béla – Budaházi Árpád, *A nemzetközi bűnügyi együttműködés joga* (Budapest: Dialóg Campus Wolters Kluwer, 2019), 119.

than at national level.[30] Prior to the Maastricht Treaty, explicit cooperation in criminal matters took the form of classic multilateral mutual legal assistance agreements, conventions or offers of criminal proceedings.[31]
The aim of European cooperation in criminal matters is not only to ensure judicial cooperation in criminal matters between Member States and to combat cross-border crime, but also to cooperate with States which, although not being members of the European Union, are involved in one or more crimes of which the Community is a victim.[32] Traditional cooperation in criminal matters has developed around the principles of mutual recognition, double criminality and speciality.
The Convention on Mutual Assistance in Criminal Matters (MLA) between the Member States of the European Union of 29 May 2000[33] and its Protocol of 16 October 2001 have taken cooperation to the next level. The so-called TREVI group, set up in 1976, can be considered as the "baby step" in criminal cooperation, while the first step was taken on 14 June 1985 with the signing of the Schengen II Convention, supplemented by the Schengen Convention of 9 June 1990. The three-pillar structure established by the Treaty of Maastricht has also contributed to the development of cooperation in criminal matters, the third pillar being judicial and home affairs cooperation, through the emergence of separate criminal powers, where cooperation has become increasingly important in cardinal areas such as the exercise of control and surveillance of the crossing of the external borders of the Community, cross-border crime and the need to combat organised crime. The Treaty of Amsterdam, which established the principle of an area of freedom, security and justice and paved the way for radical changes, was particularly important in strengthening cooperation in criminal matters, neverthelsess the Treaty of Lisbon, which codified the *principle of mutual recognition* was even more decisive, whereby Member States recognise one another's acts as valid and enforceable in the EU without any special procedure. Under this principle, Member States renounce the principle of double jeopardy and – in accordance with the principle of ne bis in idem – do not conduct separate proceedings in cases where the other State has issued a conviction (e.g. acquittal, lighter sentence, etc.).[34]

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[30] Karsai Krisztina, *Az európai integráció alapkérdései* (Budapest: KJK- Kerszöv Jogi és Üzleti Kiadó Kft., 2004, ISBN 963 224 809 0.), 13.
Karsai Krisztina, "A büntetőügyekben folytatott rendőrségi és igazságügyi együttműködésre vonatkozó rendelkezések," in: *Az Európai Unió alapító szerződéseinek magyarázata 2*, ed. Osztovits András (Budapest: Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., 2008), 1947–2022.
[31] Törő Andrea, "Bizonyíték-transzfer az európai bűnügyi együttműködésben – különös tekintettel az európai nyomozási határozatra." PhD diss., (Szegedi Tudományegyetem Állam – és Jogtudományi Kar), 2014), 43.
[32] Forstner Róbert, "Az európai együttműködés nemzetközi vonatkozásban," *Európai Tükör*, no. 1-2 (2022): 151–166.
[33] EUR-Lex - 42000A0712(01) - EN - EUR-Lex (europa.eu)
[34] Nagy Anita, "Európai nyomozási határozat a kölcsönös elismerés elve tükrében Kúriai Döntések – Bírósági határozatok," *Kúria Lapja*, no. 6 (2017): 864.

In order to give effect to the principle of mutual recognition, the Council of the European Union adopted on 13 June 2002 the Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States[35] (hereafter referred to as the EAW Framework Decision), which replaced the outdated European Convention on Extradition with a faster and more effective but politically more neutral instrument and procedure.

A European Arrest Warrant (hereinafter referred to as EAW) is a judicial decision issued in one Member State for the purpose of arresting and surrendering a requested person to another Member State for the purposes of prosecution, execution of a custodial sentence or detention order.[36] A European arrest warrant is therefore nothing more than a form of request between the judicial authorities of EU Member States. The procedure is based on the principle of mutual recognition and works through direct contacts between the judicial authorities of all EU Member States.

The aim of the European arrest warrant is to introduce a faster and more efficient procedure than the extradition procedure[37], by changing the model. Therefore, the extradition procedure is replaced by a more efficient and flexible procedure based on the principle of mutual recognition, eliminating or at least reducing the role of diplomatic and political decisions. The EAW Framework Decision – which has been transposed into Hungarian national law by the EU Act – requires national judicial authorities to recognise and respond to a request from a judicial authority of another EU country within a specified time limit and with a minimum of formalities.[38] The European arrest warrant was a major improvement of its predecessor, as the basic principles of extradition, including the prohibition of extradition of nationals, double incrimination and the principle of specificity, made surrender much longer procedure and, in the case of political, financial or military offences, the exclusion of the offence delayed the processing of the case. At the same time, the EAW differs from the traditional extradition that it replaced not only regarding the shortened procedural deadlines, due to the introduction of stricter time limits[39] and the abandonment of the double criminality test for the 32 offences listed, but also regarding the more limited grounds for refusal.[40] The policy decision was

[35] OJ L 190, 18.7.2002, p. 1-20. EUR-Lex - 32002F0584 - HU (europa.eu)
[36] EEP Framework Decision Article 1
[37] KussBach,2005, 408.
[38] Bárd Petra, *Az európai elfogatóparancs Magyarországon – The European Arrest Warrant in Hungary* (Budapest: Országos Kriminológiai Intézet, 2015), 55.
[39] The State of arrest must take a decision on the execution of the European arrest warrant within a maximum of 60 days of the arrest of the person concerned. If the person consents to surrender, the surrender decision must be taken within 10 days.
[40] Németh Kata, *Az Európai Unió Bíróságának ítélkezési gyakorlata a bűnügyi együttműködés területén* (Budapest, Mailáth György Tudományos Pályázat 2023), https://shorturl.at/ZKLnz

intended to be essentially discretionary, a legally regulated framework in which the conditions for both grant and refusal were defined.[41]

One of the advantages of the European arrest warrant is that it does away with the previous administrative and political decision-making level, which was essentially characterised by a procedure and cooperation between the judicial authorities of the Member States based on direct contacts. The novelty of the European arrest warrant is that it also allows or rather requires, the surrender of a national under certain conditions, but the place of residence in Hungary may be an obstacle. Surrender is, in fact, an informalised form of extradition, which no longer refers only to the fact of the physical transfer of the person accused, but also to a decision to that effect.[42] It obliges all judicial authorities to recognise and respond to requests from a judicial authority in another EU country with a minimum of formality and within a given time limit.

In fact, the EAW Framework Decision has limited the grounds for non-execution of a European arrest warrant by providing a list of *mandatory and discretionary grounds for non-execution.* The application of the grounds for non-execution has given rise to several questions of interpretation among national practitioners. The caselaw of the European Court of Justice (hereinafter referred as CJEU) in preliminary rulings in this field provides multiple interpretations.[43]

The grounds for refusal of a European arrest warrant – both mandatory and discretionary – are expressly defined in the EAW Framework Decision. This would seem to indicate their clarity, but an analysis of the caselaw of the Court of Justice of the European Union also shows a higher number of questions of interpretation concerning the discretionary grounds for refusal of the EAW. In the caselaw of the CJEU in 2022-2023, despite the jurisprudence developed in previous decisions of the CJEU, a significant number of questions arose on the interpretation of the double criminality condition[44], – the question of the capacity and powers of the "issuing authority" to issue an EAW[45] and the postponement of surrender based on an issued EAW require further interpretation.[46] There was also a significant number of cases in which the refusal to execute an EAW was based on a violation of a fundamental right laid down in the Charter of Fundamental Rights[47], as a result of which the CJEU had to examine the competition between the Framework Decision and the Charter of Fundamental Rights and interpret EU law in this respect. At the same time there

[41] Jacsó, "Nemzetközi elfogatóparancs, ideiglenes kiadatási letartóztatás iránti kérelem," 27.

[42] M. Nyitrai, 2009, 214.

[43] Case C-168/21 (ECLI:EU:C: 2022:558) see also Case C-158/21 PPU, Case C-699/21, Case C-700/21, Case C-245/15 Bob-Dogi (OJ C 245, 27.7.2015) https://shorturl.at/p37MB

[44] Case C-168/21. (ECLI:EU:C:2022:558), C-562/21. PPU and C-563/21. PPU. (ECLI:EU:C: 2022:100)

[45] Case C-158/21. PPU (ECLI:EU:C:2023:57)

[46] Case C-492/22. PPU (ECLI:EU:C:2022:964)

[47] Case C-261/22. (ECLI:EU:C:2023:1017).

were still cases in which the refusal to execute an EAW was based on shortcomings concerning the independence of the judicial authority of the issuing State.[48]
There is no doubt that the European arrest warrant has created a quicker, more direct and thus, to a certain extent, more efficient instrument of cooperation between the Member States of the European Union, but the questions of interpretation raised by the national law enforcement authorities reveal the shortcomings of the legislation and also show that there is still untapped potential for improvement and efficiency in the European arrest warrant, in particular as regards the examination of the links between the third-country national and the executing Member State.[49] Indeed, in the case in question, the CJEU declared that, in order to assess whether a European arrest warrant issued against a third-country national staying or residing in the territory of the executing Member State should be refused, the executing judicial authority must carry out a comprehensive assessment of all the factors characterising the situation of that national citizen and making it probable that there is a link between that person and the executing Member State, which shows that he or she is sufficiently integrated in that Member State and therefore the enforcement in the executing Member State of a custodial sentence or detention order imposed on him or her in the issuing Member State will improve his or her chances of social rehabilitation after the sentence or detention order has been served.

5. Discussion

The number and depth of preliminary rulings on the interpretation of the EU criminal law before the CJEU leads to the conclusion that, while the effectiveness of the European arrest warrant is undisputed, there is no uniformity in criminal cooperation within the EU. The lack of overall uniformity is clearly a source of difficulty and makes it essential to exercise increased vigilance in the application of the law and to obtain and constantly update accurate information on the Member States participating in each instrument. This can be achieved with the excellent assistance of Eurojust, and also of the national contact points of the European Judicial Network, based on more direct informal contacts, or even the Judicial Atlas function on EJN website,[50] which allows easy navigation and location of the competent judicial authority or the applicable EU law, that is, criminal cooperation instrument.
Since the establishment of the common market, the institutions of the European Union have been engaged in a relentless fight against criminals. In order to win the windmills battle it is essential to build cooperation in criminal matters, based on mutual trust in the legal systems of the Member States. The Court of Justice of the European Union has undoubtedly been the driving force behind

[48] Case C-562/21. PPU and C-563/21. PPU. (ECLI:EU:C: 2022:100).
[49] Case C-700/21. számú ügy (ECLI:EU:C:2023:444).
[50] European Judicial Network (EJN) (europa.eu).

this, fuelled by the proactive spirit of national judges who "turn themselves in" to the Court. The CJEU through its constant interpretative activity has shaped the existing instruments and the principles of their application, which does not only serve to establish a unified European criminal law (in certain areas), but also set the pace in the fight against transnational crime, thus taking the wheel back from the transnational criminals who dictate the pace of development.

With regard to the higher number of cases before the CJEU and thus the rich case-law, it can be said that the CJEU plays an important role in the field of European criminal cooperation by acting as an interpreter and *negative legislator*, by interpreting and chiselling out principles which indicates steps towards the mirage of a unified EU criminal law. Therefore, the judicial activity of the CJEU should be appreciated, as it has played (and still playing) a central curatorial role in the development of the current "toolbox" and sui generis principles of criminal cooperation. The principles of mutual recognition and ne bis in idem – which are the cornerstones of criminal cooperation – and the content of the instruments of criminal cooperation have been elaborated by the case-law of the CJEU. In addition, the case law of the CJEU has clarified the interpretation of certain grounds for refusal of a European Arrest Warrant. On the one hand, in the case of violation of Charter rights[51] it would have led to inhuman or degrading treatment in the issuing State as a result of its transfer; on the other hand, in the case of shortcomings in the judicial system, such as a deficit in the rule of law or a clear interpretation of the condition of double criminality. It is clear from all this that mutual trust is far from being complete and that differences in the level of protection of fundamental rights and the rule of law can arise between Member States. In both cases, Hungary is affected, which may have a negative impact on the application of standards based on negative harmonisation.

Nevertheless, my position is that despite the concerns, the EAW has proved to be effective and is being used by national courts frequently. It is undoubtedly a significant improvement on the previous rules administering extradition between Member States of the European Union, but its application is far not smooth. The fate of the legislation is a drop in the bucket of the pitfalls of criminal cooperation. The European arrest warrant, as presented in this study, is only one segment of the European system of criminal cooperation, but its development is continuous and unstoppable, and one of the most interesting element of which is perhaps the area of electronic evidence[52] together with electronic evidence,[53] the e-file due to the recent technological revolution.

[51] See more: Sampo Salmenojo, *Mutual recognition and the European Arrest Warrant: On the collision course with fundamental rights?* (Master of Law Thesis, University of Turku, Faculty of Lay, 2020).

[52] Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters COM (2018) 225 final, 2018/0108(COD).

[53] Compared to Stanislaw Tosza, "All evidence is equal, but electronic evidence is more equal than any other: The relationship between the European Investigation Order and

6. Concluding thoughts

The question of how the conceptual elements of international criminal law can be integrated with national concepts and national regulatory systems is difficult to answer for several reasons. Comparing the instruments of criminal cooperation analysed above and their effectiveness is not only difficult, but perhaps pointless, since the very wide range of territorial scope and countries involved in criminal cooperation in their relations with each other and the different aspects of the comparison render the system very diverse. However, it is possible to summarise where there are shortcomings in international and European co-operation on crime, and where and how it could be improved in order to increase the effectiveness and productivity of law enforcement.
The difficulty of international criminal cooperation lies in its vulnerability, because once a national criminal court or the ICC itself has issued an international arrest warrant, the reality is that it has few real options to rely on in the further course of the proceedings, over which it has no real control and is left in a situation of loss of control (a situation known in European criminal cooperation as mutual recognition based on mutual trust, blind trust or optimism?). Vulnerability can be defined as the fact that the State on whose territory the accused is arrested may decide to execute the arrest warrant diligently, whether or not as a result of international political pressure, or for an unrelated reason, or – even if it is out of touch with reality – the accused himself may decide to surrender voluntarily to the issuing court or to the ICC, but if he refuses, the issuing State is powerless to act and has no influence on the functioning of bodies involved in criminal cooperation such as Interpol or Eurojust. Some authors have argued that this area of international law can be paralleled with national courts, and further examine the effectiveness (or weakness) of national criminal justice systems, where there is a degree of automation in the enforcement of criminal law. It can be expected that in each case where a crime is committed, the national or local administration has committed in advance a certain amount of resources to locating, prosecuting and punishing the offender.[54] In distinction, European cooperation in criminal matters is smoother because – not surprisingly – the European Union is more integrated and has a higher gradation of cooperation and institutionalisation (such as Europol, Eurojust, EPPO, OLAF) than criminal cooperation with third countries. Among the various reasons for this, it should be stressed that the EU does not hide its intention to approximate and to some extent unify the criminal law of the Member States, thus creating a European criminal law.[55] The

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the European Production Order," *New Journal of European Criminal Law* 11, no. 2 (2020): 161–183.

[54] Han-Ru Zhou, "The Enforcement of Arrest Warrants by International Forces From the ICTY to the ICC,"217.

[55] Compared to: Karsai Krisztina, *Alapjogi (r)evolúció az európai büntetőjogban* (Szeged: Iurisperitus, 2015), Karsai Krisztina, "European Criminal Policy," *FORVM Acta Juridica et Politica 9*, no. 2 (2019): 63–81., Luisa Martin, "Effective and

institutional network of European criminal cooperation is broader and covers all stages of criminal proceedings, from investigation and prosecution to transfer of proceedings. In relation to third countries, it is necessary to rely on requests for mutual legal assistance based on bilateral or multilateral international treaties and some international organisations. On the whole, however, as a national judge, the law enforcement officer is by no means powerless, since it is possible to issue both European and international arrest and extradition warrants, depending on the suspect's place of residence.

In terms of the effectiveness of the European arrest warrant, the Framework Decision has therefore achieved its objective of speeding up and simplifying surrender procedures. In practice, however, the executing State continues to refer to the judicial authorities as a result of which, practical cooperation on the basis of the EAW form does not always work effortlessly. The case-law of the European Court of Justice has raised further practical questions by clarifying many aspects left open by the general wording of the EAW.

I agree with the view expressed by Advocate General Bobek in case C-717/18.[56] that a distinction should be made between "*individual effectiveness*" and "*structural effectiveness*" regarding the use of EAW. The former reflects the need to ensure the effective transfer of the person wanted, whereas the latter relates solely to the functioning of the procedure as a whole. In the light of the above, the present case has amply demonstrated that the effectiveness of the European arrest warrant system is primarily a matter of a swift and prompt examination of the application by the executing judicial authority, without reference to the outcome of the individual proceedings.[57]

In my view, the effective implementation of the Framework Decision could be further improved. In this respect, it is recommended that infringement proceedings be initiated against Member States that have failed to transpose correctly or fully the Framework Decision[58] and the related provisions of the procedural rights directives. Furthermore, the assistance and coordination

legitimate? Learning from the Lesson of 10 Years of Practice with the European Arrest Warrant," *New Journal of European Criminal Law* 5, no. 3 (2014): 327–348.

[56] Opinion of the Advocate General in Case C-717/18 (ECLI:EU:C: 2020:142) (ECLI:EU:C: 2019:1011).

[57] Lorenzo Grossio, "Legality, Double Criminality and Effectiveness in the European Arrest Warrant System the court of justice in X.," *European Papers* 5, no. 1 (2020): 460–467.

[58] According to the "Exploratory Study the possible Lisbonisation of Ex-third pillar acquis in area of mutual recognition in criminal matters" conducted by Spark and ICF, Hungary has mostly fulfilled its implementation obligation through the provisions of the EU Act, however, certain provisions such as § 3 (2) and (3), § 5. § the Framework Decision has not been fully transposed, which means that only partial conformity with the Framework Decision was established, while for example Article 3(5) and Article 5(4) of the EU Regulation have been only partially transposed and non-compliance with the Framework Decision was established. At the same time Hungary is in line with the European average as regards the completeness of the transposition of the EAW Framework Decision.

provided by Eurojust to the judicial authorities of the Member States could be further supported and financed from the EU budget. The same applies to training and exchanges between judicial authorities. The Commission (in cooperation with Eurojust, the European Judicial (Training) Network and the FRA) could develop and regularly update a "handbook" on judicial cooperation in criminal matters in the EU. Finally, judicial authorities would benefit from the establishment of a central database of national case law on the EAW (as in other areas of EU law). There is no doubt that there is always potential for improvement in criminal cooperation, as well as new challenges that emerge every year, the most fascinating ones at the moment are relating to crimes committed in the digital space and the electronic transfer of evidence generated in this context, and the functioning of the EPPO which encourages further work in this area.

Furthermore, improving the exchange of information and data sharing through standardised databases, further integration of existing systems such as Europol SIENA, the Schengen Information System (SIS) and Eurojust databases would be of key importance to improving the effectiveness of European criminal cooperation. Even more useful would be the increase of real-time data sharing capacities, with a particular focus on cyber security, the processing of which, through the analysis of data by automated and artificial intelligence tools, would allow a faster identification of crime patterns, again contributing to the main objective of European criminal cooperation, namely the effectiveness of law enforcement. In addition to the forementioned, in my considered opinion, an essential and critical element of resolving the current fragmented regulation and increasing efficiency would be the harmonisation of the legal framework and criminal law rules, for example the introduction of common minimum standards for several crimes,[59] such as terrorism and human trafficking, which are typically cross-border offences involving several Member States, and the establishment of a fast-track procedure for the issuing and execution of international and European arrest warrants.

In essence, the efficiency of European cooperation in criminal matters can be improved mainly in the areas of information exchange, technology involvement, legislative harmonisation and resource enhancement. The key is to reduce the current obstacles to cooperation, increase trust between Member States and use innovative tools in all areas of law enforcement.

[59] This has already been partly done by adopting the Directive on the fight against fraud affecting the financial interests of the Union (PIF), which lays down minimum standards for the definition of criminal offences and criminal penalties in the fight against fraud and other illegal activities affecting the financial interests of the Union, with a view to ensuring that they operate in a way that is consistent with the Union acquis in this area.