

EUROPEAN STUDIES



Élodie Sellier

Anne Weyembergh (eds.)

**CRIMINAL PROCEDURES
AND CROSS-BORDER
COOPERATION IN THE EU AREA
OF CRIMINAL JUSTICE**

Together but apart?



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Foreword

This volume started as a study commissioned by the LIBE Committee of the European Parliament to Anne Weyembergh and Élodie Sellier in 2018, who sought to assess how differences in national criminal procedures impact EU cross-border cooperation in criminal matters. The goal of the project was to identify new areas of priorities for the (then upcoming) European Commission and offer recommendations in this respect, building on a comparative analysis of criminal procedures in nine member states. It was submitted in July 2018 and published in August 2018. In 2019, the authors decided to transform this study into an edited volume. The several contributions were revised, updated and adapted to a book format. The resulting product is a powerful tool for understanding what may be called the third phase of cooperation in criminal justice in the European Union.

In the first stage, between the treaties of Maastricht and Amsterdam, judicial cooperation was seen as a mere ‘matter of common interest’ in the ambit of the Third Pillar, which, at the legislative level, translated into little more than the adoption of instruments aiming at simplifying the application of the Council of Europe conventions. This legal-political framework was superseded by the concept of mutual recognition within the area of freedom, security and justice proclaimed by the Treaty of Amsterdam. A second phase thus started, which had its most emblematic and prototypical concretisation in the European arrest warrant (EAW). The new approach was underpinned by the purpose of replicating, in the field of cooperation in criminal matters, the so-called ‘free circulation of judicial decisions’ that flows as a logical consequence from the protection of the five freedoms in the internal market. However, after an initial period of fascination with the possibility of merging the two common areas, the fundamentally different nature of criminal justice has put limits to such transplant, calling for separate rules regarding judicial cooperation in this field. In the current stage of legal integration, foreign decisions on criminal matters are not directly enforceable, because the area of freedom, security and justice does not embody a general clause allowing for extraterritorial

(pan-European) *executive* jurisdiction. Foreign decisions require the mediation of *constitutive* decisions to be taken by the executing Member State (e.g., the decision on whether or not to collect the requested evidence, or to arrest and surrender the individual sought by the issuing State). Strictly speaking, the object of recognition is not the foreign decision, but the *claim* that it expresses.

In the said mediation, the authorities of the executing Member State will apply not only European law, but also the domestic (and international) rules binding on them, while remaining responsible and accountable, *inter alia*, for the protection of fundamental rights. Even when they are bound by common rules (under European or international law), they often interpret them in different ways, under the influence of several local factors (legal culture, history, financial constraints, etc.). The acknowledgment of the autonomy of cooperation in criminal matters vis-à-vis the logic of the internal market, both at the normative and empirical level, and the added complexity embedded in this framework may not mean a revolution as dramatic as the one brought by mutual recognition, but they are not less important. In my view, they inaugurate what can be deemed a third stage of judicial cooperation in the EU, focussed on the harmonisation of certain rules of procedural and executive law on which cooperation ultimately depends.

This book crucially anticipates the need for further work in ‘nine areas of friction’ where that tension between domestic, EU and international law, together with divergent practices, can somehow hinder cooperation; in particular, one should high-light the topics ‘admissibility of evidence’ and ‘pre-detention and detention conditions’, because they illustrate well the legal and empirical ‘disharmony’ that may affect cooperation.

In the absence of EU standards, differences in national laws governing evidence admissibility lead the authorities of the trial country to either find evidence inadmissible, or to simply refrain from looking at how it was gathered by the authorities of the country where it was collected (‘non-inquiry’), which can easily lead to a race to the bottom in evidence admissibility standards. In either case, cooperation cannot be deemed satisfactory.

Differences on pre-trial detention procedures and detention conditions can also hamper on the application of the European Arrest Warrant. As regards the former, the main issue seems to be the differing understandings between common law and civil law systems on the need to apply pre-trial detention. The preference for bail in common law countries, as well as the divergences in how Member States are applying the case-law of the Court of Justice regarding detention conditions (namely in *Aranyosi / Căldăraru*), have prevented the execution of some warrants. In this field, one would say that further work on common standards is crucial in order to improve trust and, consequently, cooperation.

At a time when EU action in the field of cooperation in criminal matters (and criminal law in general) seems to need a new breath, the richness of the information and the thoughtful analysis provided in this volume, together with the policy-oriented matrix of the study, will certainly attract the reflection of policymakers and other stakeholders.

Pedro CAEIRO
University of Coimbra, IJ, Faculty of Law