

EPHESUS

Promoting fundamental rights in (post) pandemic times in cross-border proceedings

D3.1. Common Framework on Alternative Instruments

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Abbreviations

Abbreviation	Meaning
CECL	Centre for European Constitutional Law
CJEU	Court of Justice of the European Union
CSD	Centre for the Study of Democracy
EAW	European Arrest Warrant
EIO	European Investigation Order
EJN	European Judicial Network
EPO	European Probation Order
ESO	European Supervision Order
EU	European Union
ESC	European Strategies Consulting
FD	Framework Decision
IPS	IPS_Innovative Prison Systems
JIT	Joint Investigation Team
LoR	Letter of Request
MLA	Mutual Legal Assistance
USE	University of Seville



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Executive Summary

This report, developed under the EPHESUS project and financed by the European Commission (JUST-2023-JCOO) provides a framework establishing guidelines for common working methods, aimed at facilitating the use of alternative instruments to the use of a European Arrest Warrant (EAW). This framework seeks to enhance awareness among judicial practitioners regarding these alternative mechanisms and provide clear guidelines for their application, thereby facilitating their use alongside or instead of the EAW.

This framework builds on the results of the research-based assessment of Covid-19-related adaptations and opportunities in EAW cases and the interviews with the judiciary professionals regarding the usage of alternative instruments for judicial cooperation to the EAW. It also adds an analysis of cases in which alternatives apply. This consolidated framework displays options in the use of alternative instruments guidelines for their streamlined use.

The EAW is the first, most recognizable and most frequently used of an array of judicial cooperation instruments, available across Member States. It has proven as a valuable and effective tool in the fight against crime, so consequently legal practitioners tend to be rather reluctant to consider the use of alternative instruments.

Background

Over the past twenty years, the case law of the Court of Justice of the European Union (CJEU), certain EU institutions, and academic researchers have converged on the view that the formal requirements for issuing an EAW, as set out in the Framework Decision 2002/584/JHA, do not provide sufficient guarantees for its proportional application. That is, the EAW should not be used for relatively minor cases with low social harm or where there is no significant risk that the accused or convicted person will abscond. Instead, consideration should be given to applying measures with a lower degree of coercion. Resorting to alternative measures or instruments should be possible when the intended objective can be achieved by other means that do not involve deprivation of liberty. Since the Framework Decision on the EAW does not explicitly require an assessment of the possibility of applying less restrictive measures before issuing an EAW, such considerations are rare unless raised by the defense, which, unfortunately, does not happen often.

Overview of Alternative Instruments and Comparative Analysis

The EAW serves two key purposes in the surrender of individuals between Member States. First, it is used for the prosecution of offenses that carry a custodial sentence or detention order of at least 12 months under domestic law, encompassing all stages from investigation and pre-trial proceedings to trial and final conviction. Second, it facilitates the enforcement of sentences or detention orders of at least four months.

To promote the exploration of alternative instruments and encourage a more proportionate application of the EAW, the other existing instruments for judicial cooperation within the EU have been categorized into two groups, aligning with the EAW's primary functions. This



categorization simplifies the process of identifying suitable substitutes based on the specific purpose at hand—whether prosecution or enforcement.

In the first group, dedicated to the instruments for judicial cooperation for prosecution purposes are examined: the European Investigation Order, the mutual assistance in criminal matters, the so-called European Supervision Order, freezing and confiscation orders, joint investigation teams and the transfer of criminal proceedings.

The second group, dedicated to judicial cooperation instruments for the purpose of execution of a sentence or a detention order includes the transfer of persons with custodial sentences and the transfer of probation decisions and alternative sanctions.

The comparative analysis of the objectives and mechanism of the EAW and the various instruments available for judicial cooperation reveals that the EIO and, to a lesser extent, the ESO are among the most relevant and practical alternatives to the EAW during the prosecution phase. Similarly, the transfer of sentenced persons emerges as a key alternative for the enforcement of custodial sentences.

Use Cases and Practical Guidelines

Recognizing the crucial role of these instruments in enhancing proportionality and efficiency in cross-border judicial proceedings, we have developed a series of detailed use cases to illustrate their practical application. These scenarios, based on hypothetical yet realistic examples, demonstrate how the European Investigation Order (EIO) and the European Supervision Order (ESO) can be utilized to streamline investigative and prosecutorial processes, while the transfer of sentenced persons facilitates the effective enforcement of sentences.

Through these use cases, we aim to equip legal practitioners with concrete guidance on identifying and applying these alternatives in a manner that upholds the principles of justice, proportionality, and rehabilitation. By offering clear, scenario-based insights, we seek to encourage a more considered approach to the use of the European Arrest Warrant (EAW), ensuring that less restrictive measures are explored where appropriate.

To further support this objective, the use cases are complemented by a comprehensive Checklist for Assessing the Proportionality of an EAW, as well as flowcharts that provide a simplified visual representation of when alternative measures may be more suitable. These tools are designed to assist practitioners in making well-informed decisions, balancing the need for judicial cooperation with fundamental rights and procedural safeguards.



1. Introduction

This report outlines findings from research conducted under the EPHESUS project. The project's objective is to enhance the effectiveness of the European Arrest Warrant (EAW) in a post-pandemic context, focusing on improving both the quality and quantity of its application—ensuring that fundamental and procedural rights are upheld, particularly in remote judicial processes, while also increasing the use of mutual recognition tools that offer proportional solutions to cases typically handled by the EAW.

The EPHESUS project is implemented by a consortium of renowned partners: the Centre for European Constitutional Law (CECL, from Greece), coordinator of the project, the University of Seville (USE, from Spain), IPS_Innovative Prison Systems (IPS, from Portugal), the Centre for the Study of Democracy (CSD, from Bulgaria) and European Strategies Consulting (ESC, from Romania).

Funded by the European Commission (awarded in 2023 under the JUST-2023-JCOO call), EPHESUS specifically seeks to foster judicial cooperation in criminal matters by promoting the optimal and balanced application of the EAW, including its relevance in remote judicial proceedings. The project explores potential violations of fundamental and procedural rights associated with the EAW, especially since the onset of the Covid-19 pandemic, and aims to encourage a more measured use of alternative mutual recognition mechanisms to counter the excessive reliance on the EAW.

Additionally, the project seeks to raise awareness and develop practical skills among legal professionals involved in EAW cases, enabling them to maximize the benefits of alternative mutual recognition instruments. Ultimately, EPHESUS activities will promote these instruments to improve collaboration between the judicial authorities of participating EU countries, thereby reinforcing mutual trust and recognition among EU member states as a whole.

1.1. Purpose of the common framework

The report, *Overview of Pandemic Adaptations and Opportunities in the Use of the EAW*¹, developed under the EPHESUS project, highlights that the EAW remains the most widely utilized tool for cross-border judicial cooperation. While EU judicial professionals regard the EAW procedure as highly effective and, in some cases, irreplaceable, the majority of respondents acknowledged the need to more frequently employ alternative instruments for judicial collaboration.

¹ Available at: https://www.ephesus-project.eu/uploads/1/4/4/7/144711219/d2.2._overview_of_pandemic_adaptations_and_opportunities_in_the_use_of_the_eaw.pdf



Instruments such as the European Supervision Order (ESO), the European Investigation Order (EIO), and the European Probation Order (EPO) were identified as underutilized, despite their potential to mitigate unnecessary transfers and streamline procedures. Similarly, opportunities to use tools like Letters of Request for organizing interviews by authorities in the state of residence, transferring criminal proceedings under the 1972 Council of Europe Convention, transferring sentenced persons, or mutually recognizing sentences were also noted as insufficiently explored.

This shared framework seeks to enhance awareness among judicial practitioners regarding these alternative mechanisms and provide clear guidelines for their application, thereby facilitating their use alongside or instead of the EAW.

This framework builds on the results of the Research-based assessment of Covid-19-related adaptations and opportunities in EAW cases and the interviews with the judiciary professionals regarding the usage of alternative instruments for judicial cooperation to the EAW.

It also adds an analysis of cases in which alternatives (ESO, EPO, EIO) apply.

The Framework incorporates national findings and research carried out by other projects, as well as Eurojust, the European Judicial Network and the Network of National Experts on Joint Investigation Teams (JIT's network).

This consolidated framework displays options in the use of alternative instruments guidelines for their streamlined use.

1.1. Context and background

The EAW has been referred to as the “cornerstone” of judicial cooperation in the field of criminal law implementing the principle of mutual recognition between Member States of the European Union.² It is the first, most recognizable and most frequently used of an array of judicial cooperation instruments, available across Member States. The EAW has proven as a valuable and effective tool in the fight against crime, so consequently legal practitioners tend to be rather reluctant to consider the use of alternative instruments.

Considering the coercive nature of an EAW, and the serious consequences it imposes on the requested person's liberty and right of free movement, when applying it, one must be cautious of breaching fundamental rights, as well as the human and financial costs associated to the surrender procedure. This is why an EAW should always be proportional to its aim.

² 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, recital 6.



According to the case-law of the Court of Justice of the European Union, the formal conditions for issuing an EAW provided in the Framework Decision³ do not constitute a sufficient threshold, which could potentially allow States to use the EAW also for minor and harmless crimes.⁴ This is why the issuing judicial authorities must examine on a case-by-case basis, whether it is proportionate to issue that warrant.⁵

Throughout the two decades of application of the EAW Framework Decision, different EU institutions have raised the matter of proportionality. In 2009, the Council instructs its preparatory bodies to discuss with priority the issue of the institution of a proportionality requirement for the issuance of any EAW with a view to reaching a coherent solution at European Union level.⁶

In 2014, the European Parliament highlighted concerns regarding the disproportionate use of the EAW for minor offences or in cases where less intrusive alternatives could be employed. It recommended the introduction of a legislative proposal mandating a proportionality check. This measure would require the issuing authority to carefully evaluate the necessity of the requested action, considering all relevant factors and circumstances. The assessment would take into account the rights of the suspect or accused and prioritize the use of the least intrusive alternative that can effectively achieve the intended objectives.⁷ Following the Commission's reluctance to re-visit the EAW legal framework⁸, the Parliament reiterated its recommendations, regarding the introduction of a proportionality test again in 2016.⁹

³ As per art. 2(1) of the Framework Decision on the EAW.

⁴ The so called 'prospective proportionality'.

⁵ See Judgement of the Court (Grand Chamber) of 27 May 2019 In Joined Cases C-508/18 and C-82/19 PPU, par. 71. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0508>;

⁶ Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States (8302/4/09 REV 4), p. 3.9. Proportionality check. Available at: https://www.eumonitor.eu/9353000/1/j4nvgs5kig27kof_j9vvik7m1c3gyxp/vj6ipihqlpv1/f=/8302_4_09_rev_4.pdf

⁷ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) (2017/C 285/18). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52014IP0174&from=EN>

⁸ Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant, SP(2014) 447. Available at: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2109\(INL\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2109(INL))

⁹ European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)), p. 43. Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2016-0485_EN.html



In its Handbook on how to issue and execute an European Arrest Warrant¹⁰, the European Commission outlines the following factors that should be considered when assessing the proportionality of issuing an EAW:

- the seriousness of the offence (for example, the harm or danger it has caused);
- the penalty likely to be imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);
- the likelihood of detention of the person in the issuing Member State after surrender;
- the interests of the victims of the offence.

In line with the principle of mutual recognition, there is no possibility for the executing state to assess the proportionality of the received EAW. However, if the executing Member State has serious concerns, direct communication with the issuing Member State's judicial authorities is encouraged to find a solution (for example, they might consider withdrawing the EAW and exploring alternative national or EU measures). Eurojust and European Judicial Network (EJN) contact points can provide support and facilitate communication during this process.

In its 2020 report to the EU Parliament and the Council on the implementation of the EAW Framework Decision¹¹, the Commission pointed out that some Member States have provided for a narrower scope to address the proportionality of European Arrest Warrants that can be issued by their judicial authorities (e.g. imposing higher thresholds; requiring that a term of four months should still remain to be served, or requiring that an European Arrest Warrant must be in the interest of justice).

In this context, policy-makers, practitioners, and legal scholars alike have emphasized the importance of encouraging the broader and more efficient use of alternatives to the EAW in legal cooperation. These alternative instruments should be prioritized whenever the intended objectives—such as obtaining a statement, supervising a measure, or protecting a victim—can be effectively achieved through means that do not involve the deprivation of liberty.

Such an approach aligns closely with the principle of proportionality, which ought to underpin the application of the EAW. By ensuring that less intrusive measures are considered and

¹⁰ Commission Notice – Handbook on how to issue and execute a European Arrest Warrant (C/2023/1270). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C_202301270#ntr55-C_202301270EN.000101-E0055

¹¹ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (COM(2020) 270 final). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0270&from=EN>



implemented wherever possible, this interpretation promotes a more balanced and just use of cross-border judicial tools, reflecting the values of fairness and necessity in legal practice.

1.2. Target audience

This Framework is designed to assist legal practitioners in selecting the most appropriate and proportionate instrument for judicial cooperation, tailored to the specific circumstances of each case. Whether the EAW or an alternative measure is more suitable, this Framework provides guidance to help practitioners make informed decisions that align with the principles of necessity and proportionality. By offering clear criteria and practical insights, it aims to streamline the decision-making process and ensure that the chosen approach effectively balances the objectives of justice with the rights and freedoms of the individuals involved.

2. Overview of alternative instruments

The EAW serves two key purposes in the surrender of individuals between Member States. First, it is used for the prosecution of offenses that carry a custodial sentence or detention order of at least 12 months under domestic law, encompassing all stages from investigation and pre-trial proceedings to trial and final conviction. Second, it facilitates the enforcement of sentences or detention orders of at least four months.

To promote the exploration of alternative instruments and encourage a more proportionate application of the EAW, the other existing instruments for judicial cooperation within the EU have been categorized into two groups, aligning with the EAW's primary functions. This categorization simplifies the process of identifying suitable substitutes based on the specific purpose at hand—whether prosecution or enforcement.

Following an overview of these alternative instruments, a comparative analysis will identify which options could serve as viable alternatives to the EAW. This analysis will also provide clarity on the circumstances under which these alternatives can effectively replace the issuance of an EAW, ensuring a more balanced and judicious approach to cross-border judicial cooperation.

2.1. Judicial Cooperation Instruments for Prosecution Purposes

2.1.1. European Investigation Order (EIO)

The European Investigation Order (EIO) was established by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters¹² and designed to simplify judicial cooperation in

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0041>



criminal matters. It replaces the corresponding provisions of prior treaties¹³ and fragmented laws related to mutual assistance among EU member states. The EIO allows for efficient gathering of evidence during investigations and trials, including cases initiated by administrative authorities with judicial approval.

An EIO is a decision issued by a judicial authority in one Member State requesting the carrying out of one or several specific investigative actions in another Member State, in order to obtain evidence. It applies throughout the EU, except in Denmark and Ireland, and is based on the principle of mutual recognition. Member States must decide on the execution of an EIO within 30 days of receipt and complete the requested measures within 90 days.

The EIO applies to the gathering of evidence not only during the investigative phase of proceedings, but also during the trial phase. In some Member States, the EIO also applies to measures undertaken during the execution of a judgement (e.g. during a financial investigation for the purpose of identifying assets after a final decision on confiscation has been adopted, or to gather evidence on the circumstances surrounding the execution of a sentence).¹⁴

An EIO may be issued:

- with respect to criminal proceedings that are brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;
- in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters;
- in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters; and
- in connection with one of the previously referred proceedings which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

The EIO covers any investigative measure (including hearing by videoconference or other visual transmissions) with the exception of: the formation of a joint investigation team and the gathering of evidence within such a team; service and sending of procedural documents,

¹³ For example, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union.

¹⁴ Eurojust and EJM, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Council doc. 11168/1/19 (available in all official EU languages; available in English at: http://www.eurojust.europa.eu/press/News/News/Pages/2019/2019-07-15_Eurojust-EJM-joint-note-on-EIO.aspx).



unless the delivery of a document is instrumental to the investigative measure that is the object of the EIO; spontaneous exchange of information¹⁵; transfer of proceedings; freezing property for the purpose of subsequent confiscation.¹⁶

An EIO may be issued for the temporary transfer of a person in custody in the executing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required, provided that he shall be sent back within the period stipulated by the executing State. The practical arrangements regarding the temporary transfer of the person, including the details of his custody conditions in the issuing State and the dates by which he must be transferred from and returned to the territory of the executing State, shall be agreed between the issuing State and the executing State, ensuring that the physical and mental condition of the person concerned, as well as the level of security required in the issuing State, are taken into account.

An EIO may be issued for the temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the executing State is required.

An EIO might also be issued for questioning the suspect via video link in order to determine whether or not to issue an EAW for the purposes of prosecuting him.

2.1.2. Mutual Assistance in Criminal Matters between EU countries

Between EU Member States, the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and its two additional protocols,¹⁷ and the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union¹⁸ were partly¹⁹ replaced by the EIO Directive. Nonetheless, mutual legal assistance still exists between EU Member States for the restitution of objects to the rightful owner, spontaneous exchange of information, sending and serving of procedural documents, unless the document is instrumental to an investigative measure and the sending of information related to criminal judgments.

¹⁵ According to art. 7 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union EU countries may spontaneously share information regarding criminal offences and administrative infringements whose punishment or handling is the responsibility of the receiving authority.

¹⁶ Eurojust and EJM, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Council doc. 11168/1/19.

¹⁷ <https://rm.coe.int/16800656ce>

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42000A0712%2801%29>

¹⁹ Although, according to Eurojust there are still questions about the exact meaning of the term 'corresponding provisions' referred to in Article 34(1) EIO DIR. See, Report on Eurojust's casework in the field of the European Investigation Order, available at: <https://www.eurojust.europa.eu/publication/report-eurojust-casework-european-investigation-order>



Requests for mutual assistance and spontaneous exchanges of information must be in writing, or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. Such requests must be sent directly between judicial authorities, and shall be returned through the same channels unless otherwise specified.

2.1.3. European Supervision Order (ESO)

Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention²⁰ lays down rules according to which one Member State recognizes a decision on supervision measures issued in another Member State as an alternative to detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing State in case of breach of these measures. As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not.²¹ That is why the Framework Decision has as its objective the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention, even where, according to the law of the Member State concerned, a provisional detention could not be imposed *ab initio*.

An ESO can be forwarded to the Member State in which the person is lawfully and ordinarily residing where the person consents or, at the defendant's request, can be forwarded to a Member State other than that in which they ordinarily reside, in which case, the consent of that authority is required.

This Framework Decision applies to the following supervision measures:

- reporting changes of residence;
- restrictions on entering specific areas;
- an obligation to remain at a specified place, where applicable during specified times;
- an obligation containing limitations on leaving the territory of the executing State;
- regular reporting to authorities;
- avoiding contact with specific persons in relation with the offence(s) allegedly committed.

²⁰ https://eur-lex.europa.eu/eli/dec_framw/2009/829/oj/eng

²¹ FD 829, recital 5.



If the nature of the supervision measures is incompatible with the law of the executing State, the competent authority in that Member State may adapt them in line with the types of supervision measures which apply, under the law of the executing State, to equivalent offences. The adapted supervision measure shall correspond as far as possible to that imposed in the issuing State. The adapted supervision measure shall not be more severe than the supervision measure which was originally imposed.

The competent authority in the issuing State has jurisdiction to take all subsequent decisions relating to a decision on supervision measures. Such subsequent decisions include: renewal, review and withdrawal of the decision on supervision measures; modification of the supervision measures; issuing an arrest warrant or any other enforceable judicial decision having the same effect. In case the defendant breaches the supervision measures, the competent authority in the executing State shall immediately notify the competent authority in the issuing State and any other finding which could result in taking any subsequent decision.

The general assumption is that the defendant will voluntarily attend court dates in the issuing Member State. However, if a breach of supervision measures leads to the issuing of an arrest warrant, the defendant is to be surrendered in accordance with the EAW Framework Decision. The usual restriction that an EAW can only be issued for the surrender of someone wanted to stand trial if the maximum penalty is at least two years' imprisonment does not apply to ESO cases in principle, although Member States can decide that they will apply a minimum sentence threshold.

2.1.4. Freezing Orders and Confiscating Orders

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders²² complements the 2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime²³ and facilitates freezing and confiscation in cross-border cases. The regulation applies between EU Member States (excluding Denmark and Ireland, adhering to the prior framework).²⁴

A 'freezing order' means a decision preventing the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof.

A 'confiscation order' means a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person.

²² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1805>

²³ https://commission.europa.eu/document/download/f5c8419a-f24d-45fd-8c32-03115929b4d6_en

²⁴ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 2.8.2003, pp. 45–55) and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (OJ L 328, 24.11.2006, pp. 59–78).



The regulation encompasses all freezing and confiscation measures arising from criminal proceedings but excludes those stemming from civil or administrative cases. Proceedings in criminal matters could also encompass criminal investigations by the police and other law enforcement authorities. The term therefore covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State.

Art. 3 of the Regulation presents an exhaustive list of 32 criminal offences, when freezing orders or confiscation orders must be executed without verification of the double criminality of the acts giving rise to such orders, given that those acts are punishable in the issuing State by a custodial sentence of a maximum of at least three years. For other criminal offences, the executing State may make the recognition and execution of a freezing order or confiscation order subject to the condition that the acts giving rise to the freezing order or confiscation order constitute a criminal offence under the law of the executing State, whatever its constituent elements or however it is described under the law of the issuing State.

2.1.5. Joint Investigation Team (JIT)²⁵

Council Framework Decision 2002/465/JHA²⁶ outlines the establishment and operation of Joint Investigation Teams (JITs). A Joint Investigation Team is an international cooperation tool based on an agreement between competent authorities (both law enforcement and judicial authorities) of at least two States, established for a fixed period (typically between 12 and 24 months) and for a specific purpose, to carry out criminal investigations in one or more of the involved States.

Within the JIT, partners can directly exchange information and evidence, cooperate in real time and jointly carry out operations. Furthermore, JITs enable direct information sharing, real-time cooperation, and joint actions, allowing members from different jurisdictions to work closely. This eliminates the need to formally request the transfer of individuals or evidence through an EAW, as much of the required information can be accessed within the team itself.

JITs can be formed when investigations in one State require cooperation with other Member States. The team shall be set up in one of the Member States in which the investigations are expected to be carried out. A joint investigation team may, in particular, be set up where:

- a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

²⁵ The JITs Practical Guide developed by the JITs Network in cooperation with Eurojust, Europol and OLAF, available at:

https://www.eurojust.europa.eu/sites/default/files/assets/joint_investigation_teams_practical_guide_2_021_en.pdf

²⁶ <https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:32002F0465>



- a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.

In accordance with Council Document 11037/05, the Network of National Experts on Joint Investigation Teams (the JITs Network)²⁷ was established in 2005 to facilitate the work of practitioners, as well as to encourage the use of JITs and contribute to the sharing of experience. The national experts' role to facilitate the use of Joint Investigation Teams by disseminating information about the legal basis and the options available to practitioners. Additionally, they should make the exchange of experiences on best practices possible and be national contact points which competent national authorities and authorities from other Member States dealing with JITs could ask for expertise and information about the national legislative framework concerning Joint Investigation Teams, information about competent authorities to contact, overcoming linguistic problems etc.

The JITs enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance or European EIOs. Information and evidence collected in accordance with the legislation of the state in which the team operates can be shared on the sole basis of the JIT agreement. During discussions within the JIT, authorities can jointly assess which country is better placed to lead the investigation or prosecution. This avoids situations where multiple EAWs are issued by different countries for the same individual or case, potentially causing duplication of efforts or conflicts.

2.1.6. Transfer of criminal proceedings

EU Member States currently transfer criminal proceedings using various legal instruments, rather than a unified framework across the EU. One key legal basis for such transfers is the 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters,²⁸ which sets detailed conditions and procedures. However, less than half of EU Member States have ratified this Convention, making its application across the Union uncertain.²⁹ For Member States that have not ratified it, requests are typically based on Article 21 of the Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters, specific bilateral or multilateral agreements, or, in some cases, the principle of reciprocity combined with national law provisions.³⁰

The main reason for transferring proceedings is that it may be more appropriate to prosecute an offence in another Member State. While some Member States lack clear criteria for transferring proceedings and have no explicit restrictions, most national laws outline scenarios where transfers may be requested. These scenarios often align with those

²⁷ <https://www.eurojust.europa.eu/sites/default/files/Partners/JITs/JITs-Council-document-11037-05-EN.pdf>

²⁸ <https://rm.coe.int/1680072d42>

²⁹ As of January 2025, only 13 EU member states have ratified and are applying the 1972 Convention.

³⁰ Eurojust report on the transfer of proceedings in the EU (January, 2023). Available at:

<https://www.eurojust.europa.eu/publication/eurojust-report-transfer-proceedings-european-union>



in Article 8 of the 1972 Convention. Similarly, many Member States define grounds for rejecting transfer requests, which frequently reflect Articles 10 and 11 of the same Convention. Some national laws impose additional substantive or procedural limits on the ability to request or accept transfers.

The process for deciding on transfers also varies widely across Member States. In some, judicial authorities like public prosecutors or investigative judges handle transfers, while others involve central authorities such as the General Prosecutor's Office or the Ministry of Justice. The role of central authorities differs: they may simply transmit requests or decisions, or they may have decision-making power based on proposals from public prosecutors. In States that have ratified the 1972 Convention, the competent authorities can differ depending on the legal basis for the transfer.

In December 2020, the Council asked the Commission to evaluate whether a new EU-wide framework for transferring proceedings would be feasible and beneficial.³¹ Both Eurojust and the European Judicial Network have highlighted significant legal and practical challenges caused by the lack of clear, harmonized rules and procedures, and have called for an EU instrument to address these issues.³² To address the problems currently affecting transfers of criminal proceedings, in the end of 2024, Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters was adopted.³³ sets out the common rules for the transfer of criminal proceedings from one Member State to another with a view to improving the efficient and proper administration of justice. Without prejudice to their application between Member States and third countries, this Regulation replaces, within its scope of application, as from 1 February 2027, the corresponding provisions of the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, applicable between the Member States bound by this Regulation.

2.2. Judicial Cooperation Instruments for the Purpose of Execution of a Sentence or a Detention Order

2.2.1. Transfer of Persons with Custodial Sentences

³¹ Council conclusions 'The European arrest warrant and extradition procedures – current challenges and the way forward' (2020/C 419/09).

³² Eurojust report on the transfer of proceedings in the EU published in 2023, 'Report on Eurojust Written Recommendations on Jurisdiction' published in 2021, the 'Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction' published in 2018, and the 'Report of the strategic seminar on conflicts of jurisdiction, transfer of proceedings and ne bis in idem', organised by Eurojust in 2015. Conclusions of the 52nd EJM Plenary meeting on the role of the EJM in fostering the practical application of the EU mutual recognition instruments published in 2019.

³³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R3011>



Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union³⁴ has, for Member States, replaced the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983³⁵ and its additional Protocol of 18 December 1997.³⁶ It provides a system for transferring convicted prisoners back to the Member State of their nationality or habitual residence or to another Member State with which they have close ties.

The recognition of a judgment and enforcement of a sentence shall apply to all EU citizens and to third countries nationals, who are either in the issuing State or in the executing State. Any judgment, following criminal proceedings on account of a criminal offence, and resulting in a deprivation of liberty, may be forwarded under the Framework Decision. This means that decisions imposing internment – following the establishment of the offender’s full or partial criminal unaccountability due to a mental disability – are included in the definition used in the instrument.

The main actors ensuring cooperation under the Framework Decision are the competent authorities of the issuing State and the executing State. Member States are free to designate their competent authority or authorities under their national laws, both when acting as an issuing State or an executing State.

The Framework Decision increases the number of situations where consent of the sentenced person is not required to where the judgment together with the certificate is forwarded:

- to the Member State of nationality in which the sentenced person lives;
- to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment;
- to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

In all other cases, the informed consent of the sentenced person is required.

2.2.2. Transfer of Probation Decisions and Alternative Sanctions

³⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0909>

³⁵ <https://rm.coe.int/1680079529>

³⁶ <https://rm.coe.int/168007f2c9>



Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions³⁷ allows EU citizens sentenced to a probation or another alternative measure to return to their own countries and implement there, where competent judicial authorities will supervise the execution of the probation or alternative measure.

An EPO can be forwarded to the Member State in which the person is lawfully and ordinarily residing where the person has returned or wants to return to that State or, at the sentenced person's request, can be forwarded to a Member State other than that in which they ordinarily reside, in which case, the consent of that authority is required.

Once the competent authority of the executing State has recognized the judgment and, where applicable, the probation decision forwarded to it and has informed the competent authority of the issuing State of such recognition, the issuing State shall no longer have competence in relation to the supervision of the probation measures or alternative sanctions imposed, nor to take subsequent measures.

3. Comparative analysis

3.1. EAW and Judicial Cooperation Instruments for Prosecution Purposes

3.1.1. EAW vs. EIO

Generally, the EIO is seen as more proportionate than an EAW, particularly for minor offences or in cases where evidence can be collected remotely (e.g., through videoconference or by securing documents). Where the physical presence of a suspect is not necessary, an EIO allows judicial authorities to proceed without the complexities and potential human rights concerns associated with detention or extradition. Last, but not least, the EIO is faster and less resource-intensive than an EAW.

The overlap between the scope of an EAW and an EIO means that the EIO would be the instrument most often used as an alternative to issuing an EAW. With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be a more effective and proportionate means of pursuing criminal proceedings. However, as the Eurojust casework in the field of EIO³⁸ in the table below shows, sometimes the line between the transfers under EAW and EIO is rather blurry and leads to practical

³⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008F0947>

³⁸ Report on Eurojust's casework in the field of the European Investigation Order, 10 November 2020, 2020/00282, <https://www.eurojust.europa.eu/report-eurojusts-casework-field-european-investigation-order-0>.



complications, forcing the national authorities to struggle with choosing the appropriate instrument. Eurojust illustrates this situation with two examples:

Example 1	Example 2
<p>A person detained in one Member State was tried in absentia for another offence in another (issuing state). After a successful appeal requiring a retrial in the person's presence, and their refusal to appear via video link, the issuing state first issued an EAW (suggesting temporary transfer), then an EIO for temporary transfer. The executing state refused both: the EAW – without pointing out the grounds for refusal, and EIO - correctly citing the EIO Directive's scope. The person remains detained in the executing state, while the issuing state (with Eurojust's support) maintains the EAW's validity and seeks a solution.</p>	<p>Parallel proceedings in two Member States. The executing authority initially postponed surrender under an EAW due to ongoing domestic investigations. After unsuccessful attempts to arrange a temporary surrender within the EAW framework, the issuing authority, with Eurojust's support, explored using an EIO for DNA sampling (Article 22(1) EIO DIR), but this was rejected. Subsequently, a temporary transfer under Articles 18(1)(b), 18(2), and 24(2) EAW FD was agreed upon, enabling a rapid, one-day DNA collection at a border court due to the person's high-risk profile. This EAW-based approach proved to be more appropriate, because it didn't require the person's consent and provided greater legal certainty or the issuing authority in relation to the arrest of the requested person on the territory of the executing state.</p>

The complex factual scenarios that often arise in parallel proceedings across different Member States significantly complicate the selection of the most appropriate instrument for judicial cooperation. In such situations, a clear understanding of the distinct purposes and applications of available tools becomes essential.

One useful distinction to bear in mind is the temporary and specific nature of the EIO. When a person is transferred under an EIO, the transfer is temporary, and the individual generally returns to their home Member State once the specific investigative purpose is fulfilled. The EIO is particularly appropriate in situations where the individual is not the suspect but rather a witness or someone who can provide crucial evidence. Examples include testifying at a court hearing, participating in a reconstruction of events, or giving a deposition.

By contrast, the EAW serves a fundamentally different purpose: the surrender of individuals for prosecution. The transfer under an EAW is typically final, unless additional proceedings—such as extradition for other offenses—are necessary. The EAW is most suitable in serious cases when it is essential to transfer the individual to the jurisdiction of the requesting Member State to ensure justice.

In navigating these challenges, the support and coordination provided by Eurojust prove invaluable.



3.1.2. EAW vs. Mutual Assistance in Criminal Matters between EU countries

Since the introduction of the EIO Directive has largely replaced traditional mutual legal assistance (MLA) within the EU for evidence gathering, the MLA has rather limited scope as an EAW alternative. Similar to the EIO, the MLA could be used within its scope to gather the necessary evidence or take an action without triggering an arrest or surrender procedure.

Both instruments can be effectively combined when evidence needs to be gathered from both an EU Member State and a non-EU country. For example, authorities in Country A are investigating a high-profile corruption case involving a businessman residing in Country B. The suspect is accused of bribing public officials and laundering illicit funds through accounts in Country C. Instead of issuing an EAW to extradite the suspect for questioning, authorities take a more strategic approach using an EIO and a Letter of Request (LoR) for MLA. Authorities in Country A issue an EIO to Country B to gather evidence (e.g. financial records linking the suspect to bribes; phone and email communications with public officials; witness statements from business associates or government officials). Since Country C is outside the EU, Country A submits an MLA request under international treaties to obtain financial records from banks in Country C, freeze assets linked to the corruption case and request witness statements from individuals involved in the transactions.

This approach allows authorities to secure key financial evidence without the complexities of extradition, ensuring a more effective investigation.

3.1.3. EAW vs. ESO

The ESO offers an alternative to the surrender and detention of individuals under the EAW, allowing them to remain in their home Member State under specific supervision measures. This instrument is particularly valuable in cases involving individuals who are not deemed dangerous, do not pose a flight risk, and whose presence can be effectively ensured through less intrusive means.

An ESO enables the requesting Member State to impose tailored supervision measures, such as reporting obligations, travel restrictions, or participation in rehabilitation or support programs. These measures ensure that the suspect remains accountable and available for legal proceedings without the need for full surrender. By allowing individuals to remain in their home Member State, the ESO minimizes the disruption to their personal lives, employment, and family responsibilities. This approach aligns closely with the principles of proportionality and rehabilitation enshrined in EU law, fostering a more balanced and humane application of justice.

In contrast to the EAW, the ESO represents a more proportionate solution, especially in cases involving minor or non-violent offences. By avoiding unnecessary detention and surrender, the ESO not only reduces the strain on judicial systems but also ensures that individuals can maintain stability in their lives while remaining subject to necessary legal oversight. This



makes the ESO a pivotal tool in promoting effective, fair, and proportionate judicial cooperation within the EU.

3.1.4. EAW vs. Freezing and Confiscating orders

Freezing and confiscation orders not only disrupt the financial foundations of criminal operations but also facilitate the recovery of unlawfully obtained assets, ensuring their return to victims or the state. By focusing on the financial and material gains of criminal enterprises, these orders play a pivotal role in depriving offenders of the economic benefits of their wrongdoing. When the primary objective is to secure assets connected to criminal activity, rather than to ensure the physical presence of a suspect or accused individual, these measures offer a more targeted and proportionate response. This approach is particularly advantageous in investigations centred on financial or property-related crimes, such as money laundering, fraud, or corruption. In cases of cybercrime, money laundering, financial fraud, or organized crime, disrupting criminal networks and freezing assets is often more effective than immediately extraditing one suspect. For instance, if authorities in Country A discover that a suspect in Country B has laundered proceeds of crime and deposited them in a bank in Country C, rather than issuing a European Arrest Warrant for the suspect, they could issue a European Investigation Order to obtain financial records and a freezing order to secure the illicit funds in Country C. This not only prevents the suspect from accessing and moving the assets but also allows law enforcement to build a case for confiscation without the complexities of extradition.

By employing freezing and confiscation orders in such cases, authorities can achieve their investigative and prosecutorial goals without resorting to the more complex and resource-intensive processes associated with surrender under an EAW. Additionally, this strategy aligns with the principles of efficiency and proportionality, minimizing disruptions to the individual while ensuring that the proceeds of crime are effectively seized and repurposed for the benefit of society or restitution to victims. In this way, freezing and confiscation orders enhance the effectiveness of judicial cooperation within the EU, complementing other tools while addressing the financial dimensions of criminal activity.

3.1.5. EAW vs. JITs

JITs can serve as an effective alternative to issuing an EAW in situations where close, coordinated cross-border cooperation is required to investigate and prosecute crimes involving multiple jurisdictions. A JIT allows law enforcement and judicial authorities from different Member States to work together directly, avoiding the need for formal surrender or extradition processes. JITs are especially valuable in addressing organized crime, human trafficking, drug trafficking, and terrorism, where cross-border coordination is crucial.

A JIT enables authorities from participating Member States to share information and evidence in real time, minimizing the administrative workload and eliminating the delays often associated with formal EAW procedures. Instead of focusing on the physical transfer of a suspect, the JIT facilitates joint efforts to gather evidence and prosecute the case effectively in the most appropriate jurisdiction. During a JIT investigation, the issuance of an



EIO may prove valuable. While an EAW alerts the suspect, who may flee or destroy evidence, using an EIO and a JIT allows authorities to gather evidence discreetly before taking enforcement actions. The suspect can remain in their home jurisdiction while evidence and case-building proceed collaboratively.

JITs provide flexibility to decide which country will ultimately prosecute the suspect, potentially eliminating the need to transfer the individual under an EAW if the chosen jurisdiction already has custody or authority. By pooling resources, expertise, and information, JITs reduce duplication of efforts and make cross-border cooperation more effective and efficient compared to multiple EAWs requests.

Furthermore, even if issuing an EAW becomes necessary, its proportionality is likely to be reinforced. The close collaboration and direct communication within the JIT ensure that such a decision is made only as a genuine last resort, after all other cooperative measures have been thoroughly explored. This enhances both the justification and proportionality of the measure.

3.1.6. EAW vs. Transfer of Criminal Proceedings

The transfer of criminal proceedings offers the possibility of implementing custodial measures if necessary, making it a valuable alternative in certain cases where using an EAW may not be the most suitable option. However, the decision to transfer a case instead of issuing an EAW is not solely a matter of proportionality; rather, it often hinges on which Member State is better equipped to manage the prosecution effectively and efficiently.

Transferring proceedings can be a preferable solution in situations where issuing an EAW would be disproportionate or impractical. For instance, if the penalty thresholds required for the issuance of an EAW are not met, or if the case cannot be conducted in absentia (i.e., without the presence of the accused), transferring the proceedings becomes a more viable alternative. This is especially relevant when no other judicial cooperation tools—such as an EIO for videoconference testimony—are available to ensure the accused's presence at trial. This option is particularly important in cases involving minor offenses in Member States that adhere to the principle of legality, which dictates that cases cannot be dismissed without proper legal proceedings.

Transferring proceedings is also often considered when national authorities discover that there are parallel legal cases in another Member State involving the same individual. Such parallel cases may arise from requests for judicial cooperation or shared legal interests. In these circumstances, transferring the case is crucial to avoid violating the principle of "*ne bis in idem*", which prevents an individual from being tried for the same offense in multiple jurisdictions. This ensures that legal proceedings are streamlined and conducted within the appropriate legal framework, safeguarding both the efficiency of justice and the rights of the accused.

Additionally, the transfer of proceedings can serve as a practical solution when surrendering a suspect under an EAW is not feasible. This can occur in cases where the execution of the EAW is refused, such as in situations based on territoriality grounds. National laws may



require the rejection of an EAW even if only a small part of the alleged crime occurred within their jurisdiction. According to Eurojust,³⁹ such refusals are common and highlight the need for flexible alternatives like the transfer of criminal proceedings to ensure that justice is effectively administered, even when direct surrender is not possible.

Table 1. EAW and Judicial Cooperation Instruments for Prosecution Purposes

Instrument for Judicial Cooperation	Scope, compared to the EAW scope	Cases where it could be used as an alternative to the EAW
EIO	Overlapping scope with the EAW, as far as the EIO Directive may be used for the temporary transfer of a person to the issuing state. However, the purposes of an EAW and an EIO are different. EIO focuses on obtaining evidence. It avoids the need to surrender a suspect unless their physical presence is essential for prosecution	Minor offences: To avoid disproportionate measures for cases that do not justify surrender. Cases, when evidence can be collected remotely: When the investigation relies more on obtaining documents, data, or testimony than on the suspect's presence.
Mutual Assistance in Criminal Matters between EU countries	Different scope from the EAW. After the introduction of the EIO Directive, the Mutual Assistance in Criminal Matters between EU countries concerns mostly transfer of property and information, not people.	A letter of request for information to the Member State where the suspect/accused resides could be useful, before deciding whether an EAW would be proportionate. Could be successfully used in a combination with an EIO in cases where evidence needs to be gathered both from a EU Member State and a non-EU country.
ESO	Different scope from the EAW, as far as an ESO by definition does not include the possibility for detention of the accused person.	Non-dangerous suspect Low flight risk Minor and non-violent offences
Freezing orders and confiscating orders	Different scope from the EAW. Concerns assets, not people.	Could not be an actual alternative, but rather a complimenting instrument (for example to an EIO), hindering absconding from trial and evading justice.

³⁹ Eurojust report on the transfer of proceedings in the EU (January, 2023).



<p>JIT</p>	<p>Broader scope than the EAW.</p>	<p>More flexible and more direct cooperation in the investigation. Include multiple investigation instruments. The issuing of multiple EAWs could be avoided by carefully choosing the best placed Member State to prosecute. Even if an EAW proves to be necessary, its justification and proportionality are likely to be reinforced.</p>
<p>Transfer of Criminal Proceedings</p>	<p>Broader scope than EAW. Should the criminal proceedings be transferred, the executing State is not limited in its choice of instruments for prosecuting.</p>	<p>Minor cases; Parallel proceedings, concerning the same facts; Refusal to execute an EAW;</p>

3.2. EAW and Judicial Cooperation Instruments for the Purpose of Execution of a Sentence or a Detention Order

3.2.1. EAW vs. Transfer of sentenced persons

When transferring people sentenced to custodial sentences between EU Member States, there's an important link between the EAW and the transfer of such sentences. Framework Decision 2008/909/JHA adapts rules to allow sentence enforcement in cases involving the EAW, particularly Articles 4(6) and 5(3) of Framework Decision 2002/584/JHA. The European Commission's Handbook on the transfer of sentenced persons and custodial sentences in the European Union⁴⁰ explains this connection.

Article 5(3) provides that if the person sought by an EAW for prosecution is a national or resident of the executing State, surrender may be conditional on their return to serve the sentence in the executing State after being heard.

According to Article 4(6), if the EAW seeks to enforce a prison sentence or detention order and the person is staying in is a national, or a resident of the executing State, that State may choose to enforce the sentence under its own laws. This means the executing State can evaluate if there are valid reasons to refuse the sentence (e.g., double criminality or other conditions under Articles 7(4) and 9 of Framework Decision 2008/909/JHA). These decisions

⁴⁰ Commission notice — Handbook on the transfer of sentenced persons and custodial sentences in the European Union (2019/C 403/02), available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC1129\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019XC1129(01))



must align with the EAW rules to ensure sentences are served. Enforcing the sentence relies on how each country has implemented these Framework Decisions. For example, they must respect the principle of continued enforcement (Article 8), ensuring sentences are adjusted but still upheld.

The Court of Justice has clarified that refusal to execute an EAW requires the executing State to commit to enforcing the sentence. Simply stating willingness isn't enough. If enforcement isn't possible, the State must execute the EAW and surrender the person. This indicates that any refusal to execute an EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to execute the sentence in accordance with its domestic law.⁴¹

Instead of using an EAW to transfer someone back to the sentencing State, Framework Decision 2008/909/JHA allows sentences to be enforced in the person's home State, where rehabilitation may be more effective. This depends on:

- The person's ties to the executing State (e.g., family, language, culture, or social connections).
- Risks like reintegration into criminal networks.⁴²

Such decisions require a detailed, case-by-case evaluation⁴³ during the optional or obligatory consultations between authorities, guided by Article 4(3) of Framework Decision 2008/909/JHA. The European Judicial Network (EJN) can aid in the consultations between the competent authorities. Additionally, competent authorities often reach agreements on the concentration of proceedings on the basis of the identification of the best-placed jurisdiction. Such agreements could be reached in coordination meetings of the European Union Agency for Criminal Justice Cooperation (Eurojust), in bilateral or multilateral meetings without the intervention of Eurojust or following consultations under Framework Decision 2009/948/JHA.

3.2.2. EAW vs. Transfer of probation decisions and alternative sanctions

The EAW and the transfer of probation decisions are fundamentally distinct instruments, each serving different purposes within the framework of judicial cooperation. As a result, they are not directly comparable due to their divergent scopes and objectives.

⁴¹ Judgment of the Court of Justice of 29 June 2017, *Popławski*, paragraph 22, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62015CJ0579>

⁴² Commission notice — Handbook on the transfer of sentenced persons and custodial sentences in the European Union, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019XC1129\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019XC1129(01))

⁴³ *Ibid.*



Once a judicial decision has been passed and a sentence has been determined, the choice between these instruments becomes a matter of "either-or," depending on the nature of the sentence:

- Custodial sentences: An EAW is used to enforce imprisonment or detention, ensuring that the convicted individual is surrendered to serve their sentence in the issuing Member State.
- Non-custodial sentences or probation measures: The transfer of probation decisions applies, enabling the individual to comply with supervision or rehabilitation requirements in their home Member State.

This clear delineation underscores the complementary nature of these instruments. While the EAW prioritizes addressing serious offenses through physical surrender, the transfer of probation decisions focuses on proportionality, rehabilitation, and the preservation of the individual's ties to their community. Together, these mechanisms provide a flexible and balanced approach to cross-border judicial cooperation, ensuring that justice is both effective and equitable across Member States.

Table 2. EAW and Judicial Cooperation Instruments for the Purpose of Execution of a Sentence or a Detention Order

Instrument for Judicial Cooperation	Scope, compared to the EAW scope	Cases where it could be used as alternative to the EAW
Transfer of Persons with Custodial Sentences	Overlapping scope with EAW.	If the sentenced individual is not evading justice and their location is known, issuing an EAW may be disproportionate. In such cases, authorities should consider transferring the sentenced person under Framework Decision 909. The decision on where to enforce the sentence should prioritize the setting that offers the greatest potential for the individual's social rehabilitation.
Transfer of probation decisions and alternative sanctions	Different scope.	Not an actual alternative. EAW could be applied only to persons, sentenced to custody of at least 4 months.

4. Use cases

Considering the severe consequences that the execution of an EAW has for the requested person's liberty and the restrictions on free movement, the issuing judicial authorities should consider assessing a number of factors in order to determine whether issuing an EAW is justified. In order for the EAW to be proportionate, factors such as seriousness of the offence,



the likely penalty imposed if the person is found guilty, the likelihood of detention of the person in the issuing Member State after surrender and the interests of the victims of the offence, should be considered. Otherwise, disproportionately issued EAWs are leading to unwarranted arrests and unjustified and excessive time spent in pre-trial detention and thus to disproportionate interference with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States.

The analysis of the various instruments available for judicial cooperation reveals that the EIO and, to a lesser extent, the ESO are among the most relevant and practical alternatives to the EAW during the prosecution phase. Similarly, the transfer of sentenced persons emerges as a key alternative for the enforcement of custodial sentences.

Recognizing the importance of these instruments in promoting proportionality and efficiency in cross-border judicial proceedings, we have developed a series of detailed use cases to illustrate their practical application. These scenarios, grounded in hypothetical yet realistic examples, demonstrate how the EIO and ESO can be employed to streamline investigative and prosecutorial processes, while the transfer of sentenced persons can ensure effective sentence enforcement.

Through these use cases, we aim to provide legal practitioners with concrete guidance on selecting and utilizing these alternatives in a manner that aligns with the principles of justice, proportionality, and rehabilitation.

4.1. Use Case № 1: Applying an EIO as an Alternative of an EAW

Country A is investigating a cybercrime involving an international fraud operation that has affected several businesses within the EU. The primary suspect, Mr. X, resides in Country B, and law enforcement in Country A believes that Mr. X possesses critical digital evidence (emails, files, and communications) related to the crime, which could help solve the case. Additionally, Country A wishes to interview Mr. X about his role in the crime. The authorities in Country A wish to gather both evidence and information remotely to avoid the time and resources required for physical arrest and transport.

1. Investigation Overview:

- Country A is investigating a serious cybercrime affecting several EU-based businesses, and Mr. X is the primary suspect.
- Authorities in Country A believe Mr. X has digital evidence stored on his devices and cloud accounts, and they also wish to question him regarding his involvement in the fraud scheme.
- Mr. X is located in Country B.

2. Necessity of Evidence and Testimony:



- The authorities in Country A are focused on obtaining key digital evidence from Mr. X's devices and online accounts, which are believed to contain communications and transaction records related to the fraud.
- In addition, Country A wishes to conduct an interview with Mr. X to directly question him about his involvement and to assess whether he is cooperating with the criminal organization.

3. Legal Framework – European Investigative Order (EIO):

- Country A issues a European Investigative Order (EIO) to Country B, requesting the collection of digital evidence and the interview of Mr. X.
- Country B, under the EIO, is asked to facilitate both the remote collection of evidence (including emails, documents, and messages) from Mr. X's devices and to arrange an interview with him, either directly or via videoconference.

4. Issuing the EIO:

- The judicial authority in Country A submits a formal request to Country B, specifying the types of evidence they need (digital data) and requesting the interview of Mr. X.
- The request includes a detailed justification for both parts of the order:
 - Evidence gathering: The need to access Mr. X's cloud storage and devices to gather critical evidence for the ongoing investigation.
 - Interview: The necessity of questioning Mr. X to further understand his role in the criminal organization and to verify the collected evidence.

5. Execution of the EIO in Country B:

- Upon approval from the judicial authority in Country B, Country B's authorities begin the process of remote evidence collection. Digital forensics teams access Mr. X's devices and online accounts (with appropriate legal safeguards) to obtain the required evidence, such as emails, financial transaction logs, and communications.
- Simultaneously, Country B's authorities arrange the interview with Mr. X. Since extradition is not requested, and Mr. X is not in custody, the interview is set to take place via videoconference to comply with the legal requirements of both countries.

6. The Videoconference Interview:



- Country B's law enforcement agency facilitates the videoconference, ensuring that Mr. X's rights are respected throughout the process (e.g., ensuring access to legal representation if required).
- The interview is conducted in real-time, with officials from Country A participating in the videoconference. They are able to ask direct questions, present evidence, and allow Mr. X to respond to the allegations of his involvement in the fraud operation.
- The videoconference is recorded and documented as part of the official investigation, ensuring the integrity of the process and that any information provided is admissible in both Country A and Country B.

7. Transmission of Evidence and Interview Transcript:

- After the interview, the transcript of Mr. X's statements, along with any additional digital evidence (such as files and communications), is sent securely from Country B to Country A.
- This information provides critical insight into the criminal network and Mr. X's role in the fraud. The authorities in Country A analyze the evidence and statements to determine the next steps in the investigation.

8. Follow-up Actions:

- Based on the digital evidence and the statements made during the interview, Country A's authorities may decide to issue further requests for additional evidence or seek cooperation from Mr. X's associates.
- If new evidence or contradictions in the interview arise, Country A could choose to issue an EAW at a later stage if arresting Mr. X becomes necessary for the investigation.

4.2. Use Case № 2: Using a European Supervision Order Instead of a European Arrest Warrant

Mrs. Y, a 28-year-old national of Member State A, resides in Member State A but was charged with aggravated assault in Member State B during a temporary stay. Mrs. Y is alleged to have been involved in a bar fight resulting in significant injuries to another individual. Following her arrest in Member State B, Mrs. Y was released on bail under strict conditions, including a prohibition on leaving the jurisdiction and periodic reporting to the local police.

Mrs. Y subsequently returned to Member State A without violating any conditions but missed a court hearing due to logistical challenges. Member State B must now decide how to proceed to ensure Mrs. Y's presence at future legal proceedings and adherence to judicial measures.

1. Assessment of Circumstances

- Personal and Social Circumstances



- Residency and Community Ties: Mrs. Y lives permanently in Member State A with her family and is employed full-time.
- Prior Conduct: Mrs. Y has no prior criminal record and is considered a low flight risk based on their cooperation during the initial investigation.
- Financial and Social Implications: If Mrs. Y were detained in Member State B under an EAW, she would risk losing her job and severing familial ties, significantly impacting her social and economic stability.
- Nature of the Offense
 - Severity: Aggravated assault is a serious offense, but the case does not involve organized crime or transnational implications, reducing the necessity of immediate detention in Member State B.
 - Legal Status: Mrs. Y is presumed innocent until proven guilty and is entitled to non-custodial measures unless detention is strictly necessary.

2. Initial Consideration of Instruments

- European Arrest Warrant (EAW): Guarantees Mrs. Y's presence in Member State B by compelling their physical surrender, but is disruptive to Mrs. Y's life, disproportionate for pre-trial proceedings, and contradicts the principle of proportionality given their low flight risk.
- European Supervision Order (ESO): Ensures compliance with judicial measures in a less intrusive manner, maintaining Mrs. Y's social and professional stability while fulfilling Member State B's legal requirements. However, there is always risk, that Mrs. Y may try to abscond.

3. Issuance of ESO

Member State B's judicial authority evaluates the necessity and proportionality of an ESO as an alternative to an EAW. Member State B determines that an ESO is appropriate due to low flight risk, proportionality and mutual trust between EU Member States.

Member State B drafts a request under the ESO framework, detailing the alleged offense and legal status of Mrs. Y and the specific supervision measures to be implemented in Member State A, such as periodic reporting to local authorities and travel restrictions.

4. Review by Member State A

Supervision measures include mandatory weekly check-ins at the local police station and prohibition on international travel without prior judicial authorization. Member State A assesses the compatibility of the requested measures with its domestic legal system.



Authorities in Member State A confirm their capacity to monitor and enforce the measures effectively.

5. Notification to Mrs. Y

Mrs. Y is informed of the proposed ESO and its implications, including her rights and obligations under the supervision measures. Consent is not required but is facilitated through clear communication.

6. Reporting and Compliance

Member State A regularly updates Member State B on Mrs. Y's compliance. Any breach of conditions triggers immediate communication and potential reconsideration of measures.

4.3. Use Case № 3: Transfer of a Sentenced Person Instead of an EAW

Mr. Z, a 35-year-old national of Member State A, resides permanently in Member State A and has deep familial and professional ties there. While traveling to Member State B, Mr. Z was convicted of drug trafficking, specifically the transportation of illegal substances across borders, and sentenced to three years of imprisonment. The sentence is final and enforceable, but Mr. Z has not yet begun serving the term.

1. Detailed Assessment of the Circumstances

o Personal and Social Circumstances

- Nationality and Residency: Mr. Z is a citizen of Member State X and has resided there since birth.
- Family Ties: Mr. Z lives with their spouse and two young children in Member State A. His extended family, including aging parents, also resides in the same city.
- Employment: Mr. Z is self-employed, operating a small business that contributes to his household income and provides stability to his family.
- Community Involvement: Mr. Z is actively involved in community services and has a strong support network within his neighbourhood, including participation in local cultural and educational activities.

o Nature of the Crime and Sentence

- Severity: While drug trafficking is a serious offense, the court acknowledged mitigating circumstances, such as Mr. Z's lack of prior convictions and their role being limited to transportation under duress.



- Sentence: The three-year sentence reflects the severity of the crime but also considers the potential for rehabilitation.
- Practical Challenges
 - Serving the sentence in Member State B would isolate Mr. Z from his family and community, potentially leading to social and emotional disconnection.
 - Language and cultural differences in Member State B could hinder access to tailored rehabilitation programs.

2. Consideration of Social Rehabilitation

- Proximity to Family
 - Serving the sentence in Member State A allows Mr. Z to maintain regular contact with their spouse, children, and extended family. This contact is crucial for emotional stability and reintegration.
- Cultural and Linguistic Familiarity
 - Being in a familiar cultural and linguistic environment enables Mr. Z to access rehabilitation programs tailored to their specific needs, such as therapy, educational courses, or vocational training.
- Post-Release Integration
 - Completing the sentence in Member State A allows for continuity in Mr. Z professional life, reducing the risk of unemployment and financial instability post-release.
- Community Support
 - Mr. Z's involvement in local community activities provides an additional layer of support, encouraging reintegration and reducing the likelihood of recidivism.

3. Decision-Making Process

- Initial Consideration of Instruments
 - EAW: Member State B could issue an EAW to enforce the sentence. However, this would result in Mr. Z serving his sentence in an environment with minimal social and familial support, which is detrimental to rehabilitation prospects.
 - Transfer under Decision 2008/909/JHA: Allows Member State B to request that Member State A enforce the sentence, ensuring Mr. Z remains in a familiar and supportive environment.



- Request by Member State B
 - Member State B formally assesses the case and determines that transferring the sentence to Member State A aligns with the principle of proportionality and the objectives of the Framework Decision.
 - Member State B sends a transfer request to Member State A, including a detailed case file outlining the conviction, sentence, and rationale for the transfer.
- Evaluation by Member State A
 - Member State A reviews the case to ensure compatibility with its legal framework, confirming that the sentence can be enforced domestically without substantial modification.
 - Authorities in Member State A assess whether Mr. Z's rehabilitation would benefit from serving the sentence locally, considering their social, familial, and professional ties.
- Consent of the Sentenced Person
 - Under Article 6 of Decision 2008/909/JHA, Mr. Z's consent is not mandatory, as the transfer is to their home country. However, Mr. Z is informed of the process and expresses their preference to serve the sentence in Member State A.
- Decision and Implementation
 - After mutual agreement, Member State A accepts the transfer request, and arrangements are made for Mr. Z to begin serving their sentence under the supervision of Member State A's correctional system.

4. Final Decision

Member State B, in consultation with Member State A, concludes that transferring the enforcement of the sentence to Member State A under Decision 2008/909/JHA is the most appropriate course of action. This decision prioritizes the principles of proportionality, mutual recognition, and the EU's commitment to enhancing social rehabilitation of sentenced persons.

By facilitating the transfer, both Member States contribute to Mr. Z's successful reintegration into society while upholding the rule of law and ensuring the sentence is duly enforced.



5. Practical Guidelines

5.1. Proportionality of an EAW Checklist

This checklist is designed to guide judicial authorities in evaluating whether issuing an EAW is appropriate and proportionate in a given case. It also helps determine if alternative instruments, such as a European Investigation Order (EIO) or a transfer request under Framework Decision 2008/909/JHA, might be more suitable.

Seriousness of the Offence:

1. Does the offence fall within the categories, requiring an EAW under Article 2(2) of Framework Decision 2002/584/JHA (e.g., terrorism, human trafficking)?
2. Is the offense punishable by a custodial sentence or detention order of at least 12 months in the issuing State?
3. Is it likely to put the person in pre-trial detention after surrender?

Nature of the Crime:

1. Is the crime a serious threat to public safety, security or justice?
2. Does it involve cross-border criminal activity?
3. Has it caused serious consequences?

Potential Sentence:

1. Is the likely penalty significant enough to justify the use of an EAW?
2. Is the custodial sentence/detention order of at least four months for enforcement cases?

Fundamental Rights

1. Does issuing the EAW respect the fundamental rights of the individual, as guaranteed by the Charter of Fundamental Rights of the EU?
2. Are there risks of violations, such as disproportionate punishment or inhumane treatment in the issuing or executing State?

Impact on the Individual

1. Is the accused/sentenced person likely to abscond?
2. Is the impact of issuing an EAW on the accused/sentenced (e.g., deprivation of liberty, family disruption) proportionate to the seriousness of the crime and the expected sentence?



3. Has the person's age, health, family situation, or other personal factors been considered?

4. Would issuing an EAW lead to unnecessary hardship for the accused/sentenced person?

4. How will be the interests of the victim(s) of the offence be affected?

Necessity:

1. Is the EAW absolutely necessary to achieve the objectives of the criminal proceedings or enforcement of the sentence?

Subsidiarity:

1. Are there less intrusive measures available to achieve the same result without issuing an EAW?

2. Could a European Investigation Order (EIO) effectively gather evidence or testimony instead of arresting the individual?

3. If the person is already serving a sentence, could their transfer to serve the sentence in their home Member State be a more appropriate option? Could the individual's rehabilitation be better supported in the executing State?

4. Could other forms of judicial cooperation achieve the same objective?

Cost-Effectiveness and Resources

1. Is the use of an EAW reasonable in terms of the costs and resources required for its execution (e.g., transport, legal representation)?

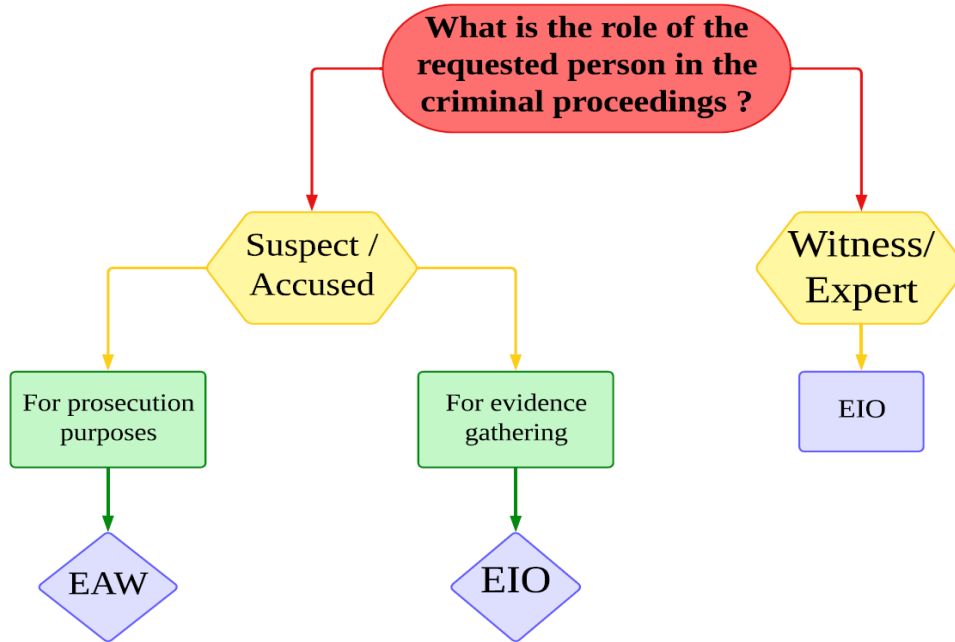
Consultation and Cooperation

1. Have consultations with the authorities in the executing Member State been conducted to explore feasible alternatives or to assess the case's merits?

2. Have tools such as the European Judicial Network (EJN) or Eurojust been considered to facilitate discussions about proportionality and alternatives?

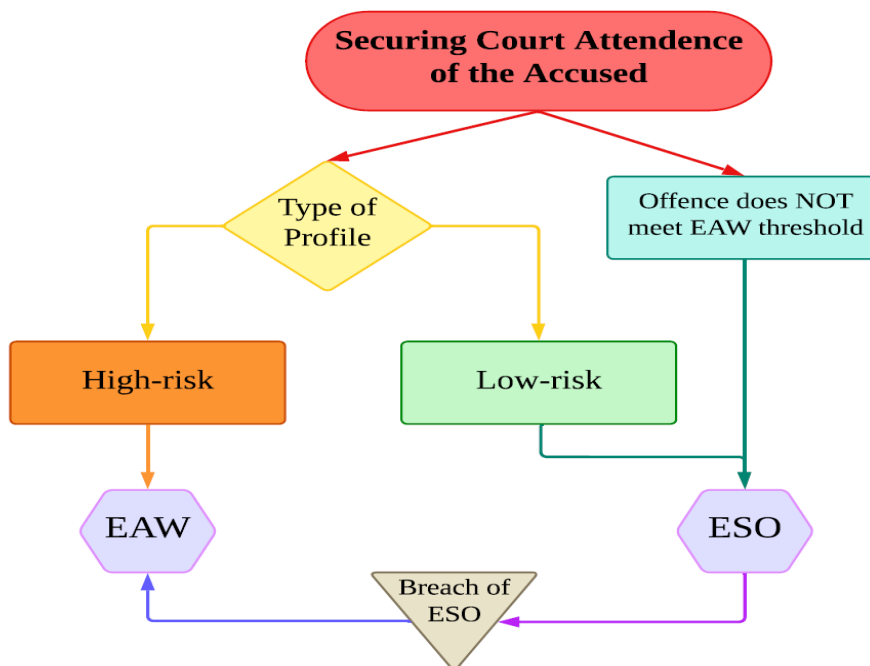
5.2. EAW vs. EIO Flowchart

Figure 1. EAW vs. EIO Flowchart



5.3. EAW vs. ESO Flowchart

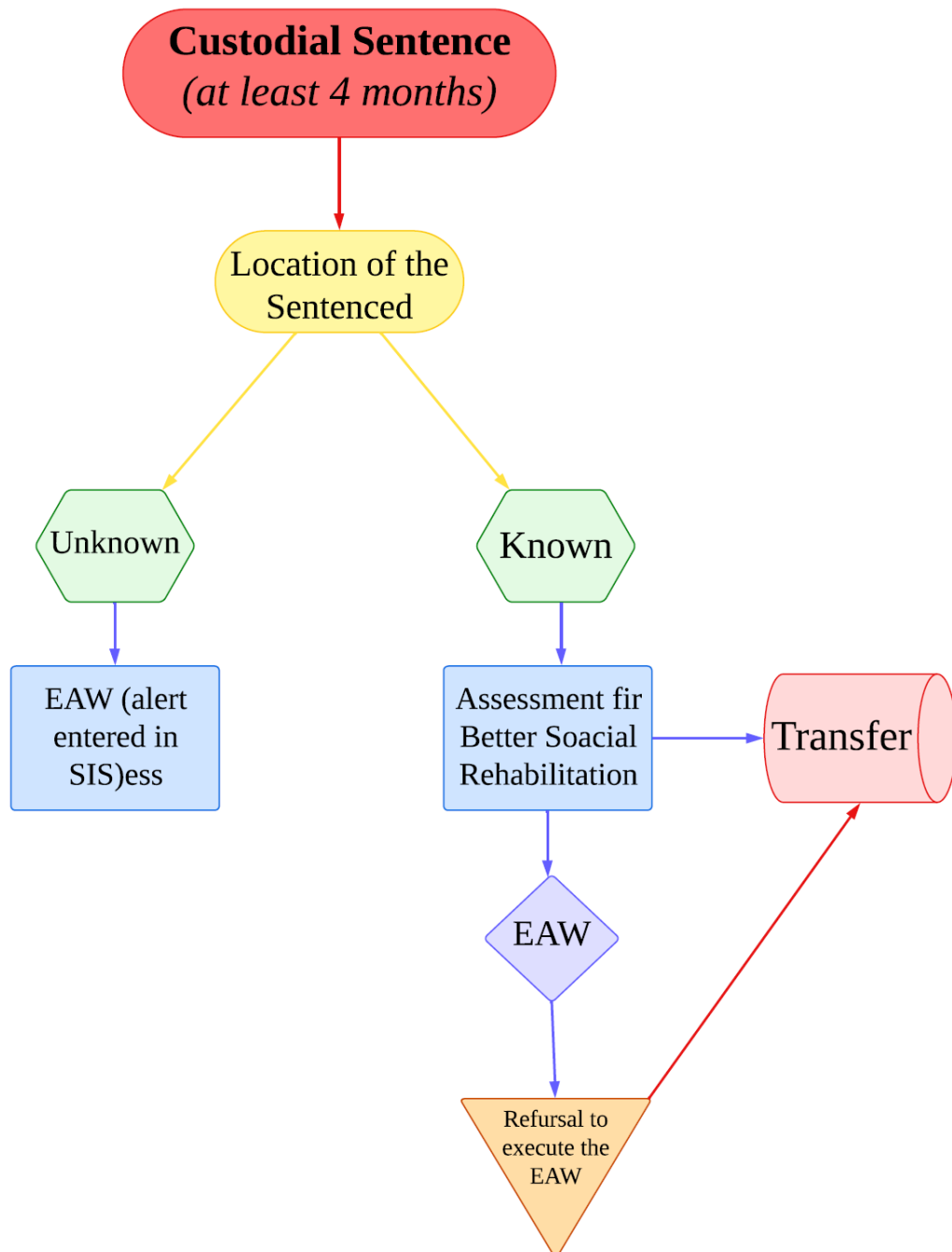
Figure 2. EAW vs. ESO Flowchart





5.4. EAW vs. Transfer of Sentenced Persons Flowchart

Figure 3. EAW vs. Transfer of Sentenced Persons Flowchart





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