

GOOD PRACTICES

What is a good practice?

For this project, a “good practice” is defined as a working method that has proven to yield good results—or is expected to do so—and is relatively easy to implement, in that it does not require changes to the European or national legal framework. In this context, “good results” means that the practice is considered recommendable for reasons of efficiency, effectiveness, and coherence.

Good practices

- *Filing a request to a competent issuing authority for the application of an instrument*¹
 - Whenever an authority files a request to a competent authority to apply an instrument of transborder cooperation the requesting authority justifies the request by at least specifying which alternative options were taken into consideration and the reasons for not choosing these alternative options.
 - In justifying the request, the requesting authority at least gives reasons for its opinion that the application of the instrument is proportional, *i.e.* that applying the instrument is sufficiently effective while being not more intrusive than necessary and, especially, gives reasons for the necessity of detention, if the instrument involves deprivation of liberty (see *infra*, ‘*Observing proportionality*’).
- *Assessing a request for the application of an instrument*
 - The competent issuing authority gives its own assessment using the justification given by the requesting authority with regard to available alternative options (see *infra*, ‘*Taking into account alternatives when deciding on the application of*’) and the proportionality of the application of the instrument for which the request is filed. This means that the competent authority gives a full assessment instead of merely assessing whether the request is ‘reasonable’.
 - The competent issuing authority asks for further clarification and information if needed for its assessment.

¹ This more or less reflects the Polish practice of issuing an EAW. See, Wąsek-Wiaderek & Zbiciak, “The practice of Poland on the European Arrest Warrant”, in: Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, & Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23, Eleven Publishing 2022, p. 256-262.

- The competent issuing authority gives a reasoned decision on the request in which attention is paid at least to available alternative options and the proportionality of applying the instrument requested.²
- *Observing proportionality and efficiency*
 - The competent Dutch authority will not request the issuing of an execution-EAW, if less than 120 days of the sentence *remain to be served* by the requested person,³ thus ensuring a measure of proportionality that goes beyond the requirement of a sentence, *as imposed*, of at least four months. It can also be qualified as an efficient approach.⁴
- *Taking into account alternatives when deciding on the application of:*
 - the EAW
 - The suspect, the accused person and the sentenced person can be served with a summons for an interrogation, for the trial or for serving the sentence, without the need to meet a particular threshold. This option is a less intrusive alternative to issuing an EAW for the purpose of prosecution or enforcement of the sentence. If the suspect/accused person has a defence counsel, a summons can be served directly on the counsel, provided that the counsel is authorised to accept service of documents on behalf of the suspect or accused person.⁵
 - As reported by some Polish practitioners, only if bringing charges against a person residing in another Member State by using the EIO seems ineffective due to the circumstances of the case and the character

² Of course in as far as the circumstances allow for giving a substantial reasoning. *E.g.*, in urgent cases giving a substantial reasoning might not be feasible. Providing a reasoning should be facilitated by a (digital and interactive) format.

³ Dutch report, para 3.2(b)(ff)('Custodial sentence'; 'Application').

⁴ One might object to the qualification 'good practice' because it may result in impunity.

⁵ German report, p. 46 and 65, referring to an established practice on summoning the accused person to the trial; see e.g. Higher Regional Court Berlin, Decision of 10 November 2010 – 3 Ws 459/10, (2011) *Neue Zeitschrift für Strafrecht*, 653 (at 654); Higher Regional Court Karlsruhe Decision of 16 September 2014 - 2 Ws 334/14, (2015) *Strafverteidiger*, 346.

of the offence charged, the procedural organs resort to issuing a prosecution-EAW.⁶

- According to some Polish practitioners, granting a ‘letter of safe conduct’ combined with a bail, in less severe cases may be an adequate measure for securing the appearance of the accused person before the procedural authorities whenever required without issuing a prosecution-EAW.⁷

- the EIO

- Before issuing an EIO for the purpose of bringing charges against a suspected person who is a Polish citizen and who resides in another Member State, in general the public prosecutors in Poland first try to have the suspected person interrogated as a suspect by a consul at consular premises in that Member State.⁸ The suspect or the accused, if they are Polish citizens and appear voluntarily, may be interrogated in another Member State by the Polish consul at the consulate premises (Article 26 (1) of the Consular Act). This may take place only if that Member State does not object to such practices. Such interrogation of a suspected person as a suspect by a consul is considered as an option before issuing the EIO for the purpose of bringing charges against such person.

- the EAW or the EIO

- The suspect and the accused can be served with a summons for interrogation or for trial directly at his address abroad (if known to procedural authorities). Polish authorities explore such an option in certain categories of cases before issuing the EIO for the purpose of interrogation of a suspect.⁹
- The suspect and the accused, if they are Polish citizens, may also be summoned to appear at the Polish consulate abroad for interrogation.

⁶ See the Polish report, para. 2.2.1.(b)(aa).

⁷ This Polish practice seems to be effective and efficient: para. 2.3.(1)(i)(bb) and para. 2.2.2.(b) (i) (aa).

⁸ See the Polish report, para. 2.2.1.(b)(aa).

⁹ See the Polish report, paras. 2.3.(b)(ii)(aa); 2.2.1.(b)(aa).

Such option usually is explored before issuing the EIO for the purpose of interrogation.¹⁰

- the ESO
 - In a certain category of cases, Polish authorities sometimes regard imposing a bail as a sufficient and proportionate measure to secure the proper course of the proceedings. Moreover, bail can be supervised without resorting to the ESO mechanism of cooperation.
- All instruments:
 - If the whereabouts of the requested person are unknown, before requesting judicial cooperation, issuing an alert in the Schengen Information System for the purposes of communicating the place of residence or domicile of persons should be considered.¹¹
- *Interrogating the suspect or the accused person on a voluntary basis*
 - In cases where the executing judicial authority has released the requested person provisionally because detention is not necessary to ensure the execution of the EAW and the surrender of the requested person (Art. 12 FD EAW), German issuing judicial authorities sometimes grant safe conduct to requested person in order to conduct the interrogation, in the issuing Member State, on a voluntary basis.¹²
 - According to recent case-law of Polish courts, granting a ‘letter of safe conduct’ (in the Polish Code of Criminal Procedure also called an ‘iron letter’) to a suspect/an accused upon his request, is also possible if he is already subject to an EAW issued for prosecution purposes that is not executed yet. As transpires from recent jurisprudence, in case of granting a ‘letter of safe conduct’ (if necessary combined with bail), the prosecution-EAW could be withdrawn.¹³

¹⁰ See the Polish report, para. 2.2.1.(b)(aa).

¹¹ See the Spanish report, p. 127-128.

¹² See the German report, p. 54, referring to a case in which the interrogation of the accused person resulted in the termination of criminal proceedings and the issuing (German) authority revoked the European arrest warrant; see also the Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Documents 7960/1/20 REV 1, p. 143.

¹³ See the Polish report, para. 2.2.2.(b)(i)(aa). See, decision of the Katowice Court of Appeal of 26 October 2016, II AKz 566/16, Lex no. 2312317.

- *Involving Eurojust*
 - In general, involving Eurojust in the communication between issuing and executing authorities instead of direct communication can be a good practice in case clarifications are needed or if information of a general (legal) nature is needed (*e.g.* information that is within the competence of other authorities than the issuing authority).¹⁴ More specific, involving Eurojust can contribute to efficiency by avoiding misunderstandings about requests for information and information supplied. Involving Eurojust may also smoothen the communication in sensitive cases, *e.g.*, cases in which the issuing authority wishes to explore alternative options for reasons of proportionality.¹⁵

- *Applying general rules on international cooperation*
 - In cases in which an EU cooperation instrument is not applicable, German authorities sometimes consider whether recourse to the general rules on international cooperation in criminal matters is an option (*e.g.* with regard to the cross-border supervision of a sentenced person after postponement of the enforcement of the sentence, which is outside the scope of FD 2008/947/JHA).¹⁶ In addition, if transfer of supervision via issuing an ESO is not an option for the competent German court, recourse to the general MLA regime enables the competent court to request assistance in supervision (the police of the other Member State sends a fax confirming whether the sentenced person has reported to the police).¹⁷

¹⁴ See the Dutch report which refers to *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (Eurojust 2021)'.

¹⁵ The German report mentions consulting the EJN contact point.

¹⁶ German report, p. 89, see, *e.g.* District Court Trier, decision of 21 November 2021 – 8031 Js 24537/20, (2021) *BeckRS*, 37436. Likewise, cross-border supervision of probation measures has been based on the (general) MLA regime when FD 2008/947/JHA had not been implemented into German law, see Higher Regional Court Munich, Decision of 8 March 2013 – 1 Ws 84/13 and 88/13, (2013) *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 211.

¹⁷ German report, p. 49 f.; see also Evaluation Report on Germany on the 9th round of mutual evaluations. Council-Document 7960/1/20 REV 1, p. 143.