Towards a

European Legal Framework

for Active Cross-Border Search of Fugitives

Prof. Dr. Gert Vermeulen

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Structure

› preliminary observations
  › fugitive
  › not (mere) police issue
› a journey from passive to active cross-border search mechanisms in international cooperation instruments in Europe
  › passive search
  › moderately active search
  › genuinely active search
› recommendations for EU action
Fugitive

- generic ‘operational’ term encompassing all fugitives, i.e. (alleged) offenders (suspects and convicted persons)?
- or focused on/limited to convicted persons who try to avoid enforcement of their penalty involving deprivation of liberty by having escaped or having fled from the country of conviction?
- difference is highly significant
  - suspects: no particular problems arise, in that regular search mechanisms, mutual legal assistance (MLA) and other cross-border cooperation instruments can be used – websites not
  - convicted criminals: regular passive (websites doubtful) and moderately active search mechanisms may be used – use of genuinely active search mechanisms doubtful and very limited, both in European/international & domestic law
Not (mere) police issue

- **sometimes** also an issue for **border control authorities, customs authorities and intelligence services**
- **almost necessarily** an issue for **judicial authorities**
  - cross-border search and investigative measures predominantly MLA-based (judicial cooperation)
  - limited police autonomy in international cooperation in criminal matters
  - often proper domestic judicial control required, at least for taking of intrusive, coercive or special investigative measures
  - pitfall for enthousiast police, if not properly backed up by judiciary (JIT lessons learned)
Passive search

- traditional international notification and alerting
  - merely aimed at
    - localisation
    - provisional arrest in view of
    - extradition or surrender (all fugitives)
  - possibilities
    - international arrest warrants/Interpol red notices
    - alerts based on Article 95 SIC
- most wanted websites?
  - privacy and necessity/proportionality issues
    - especially for suspects, but also for convicted persons
    - latter in particular being unlikely to file complaint though
Moderately active search

› non-traditional alerting (all fugitives)
› alerts aimed at discreet surveillance or specific checks under Article 99 SIC
› creative use or even misuse (not recommendable)
   › requires labeling of the fugitive as a serious (security) threat by the intelligence services
› data on persons (who may lead to detection of fugitives and accompanying persons), objects carried, vehicles, boats, aircraft, searches therein, routes and destinations
› allowing for border, police and customs checks within the Schengen states (i.e. not only at external border)
Genuinely active search (1)

- investigative measures (ordinary and special)
- for suspects: routine instruments available
- for convicted persons
  - domestic law (for int’l law will depend on it)
    - taking of investigative measures traditionally limited to pre-trial (and trial) phases and post-sentencing review procedures (new elements)
  - post-sentencing judicial (independent and impartial) control on (the necessity, proportionality etc, especially of intrusive, coercive or special) investigative measures for fugitive search purposes usually unforeseen
Genuinely active search (2)

- for convicted persons (continued)
  - European cooperation instruments in criminal matters
    - offer hardly any viable possibilities
      - traditional limitation of scope to the prevention, detection, investigation or prosecution of offences
    - full quick-scan (see side document)
  - idem moreover for Eurojust and Europol
Recommendations for EU action (1)

EU level

radical broadening in scope of relevant international assistance & cooperation instruments, Europol and Eurojust to post-sentencing phase

also recommended in IRCP judicial cooperation study

caveat 1: many techniques relevant for active fugitive search remain unregulated even in currently available instruments

coming under the voluntary ‘widest measure of assistance’ regime

whereas, given their intrusive or coercive nature, it is very unlikely that MS will execute them except under relatively strict conditions
Recommendations for EU action (2)

- examples (non-limitative list): registration of incoming and outgoing telecommunication numbers; interception of so-called direct communications; obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network; withholding and intercepting of mail (and reading it); (cross-border) use of technical devices (electronic/GPS tracking) for the purposes of observation; entry of premises without consent in view of discrete visual control or search; (discrete) photo and video registration etc
Recommendations for EU action (3)

- must be regulated for all phases
  - (= one of the problems of the proposed EIO)
- caveat 2: in absentia judgements
  - comparable safeguards as in FD on the matter?
- caveat 3: dependence on domestic law
- MS level: mandatory introduction (at least for EU crimes?)
  - of the possibility to take investigative measures in the post-sentencing phase, at least for FAS purposes
  - of sufficient (independent and impartial) post-sentencing judicial control mechanisms on investigative measures for fugitive search purposes
Recommendations for EU action (4)

- EU external relations level
  - update existing conventions with 3rd countries
    - EU-US MLA convention, Europol-US agreement, ...
  - inter-institutional request to also address the issue at
    - CoE level (CDPC & PC-OC)
    - UN level (UNODC)