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From:	Presidency
To:	Delegations
Subject:	European Arrest Warrant (EAW) - Follow-up of the virtual EAW Conference on 24 September 2020 and the discussion on current challenges and the way forward - Presidency paper

Delegations will find attached a Presidency paper, which was prepared in view of the informal videoconference of the COPEN Working Party on 12 October 2020. The paper addresses the current challenges and highlights possible solutions to improve the application of the European arrest warrant. It draws in particular on the discussions during the COPEN (VTC) meetings on 9 July and 7 September 2020, in which the latest implementation report by the Commission and the European Implementation Assessment by the European Parliamentary Research Service were presented.

The discussions and findings of the virtual conference on the European arrest warrant, which was held on 24 September 2020 in the context of the German Presidency, have also been incorporated.

At the informal video conference of COPEN members on 12 October 2020, the Presidency intends to have an exchange of views with delegations on the issues identified and the possible solutions set out in this discussion paper. Delegations are invited to present further areas requiring action, as well as any suggestions in this regard.

ANNEX

Presidency discussion paper

The European arrest warrant: Current challenges and the Way Forward

Introduction

1. On 20 June 2019, the European Council agreed on an agenda for the next five years. The key priority of the Strategic Agenda 2019-2024, which will guide the work of the EU institutions, is protecting citizens and freedoms. Europe must be a place where people feel free and safe. To this end, the fight against terrorism and cross-border crime must be expanded and strengthened. Cooperation in criminal matters and the exchange of information must be improved, and common tools must be further developed.

2. The key instrument of judicial cooperation in criminal matters is the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, EAW Framework Decision). The EAW Framework Decision has simplified and accelerated cooperation in criminal matters between Member States by introducing a new simplified system of surrender of persons suspected or convicted of a criminal offence, based on the principle of mutual recognition. The EAW makes an essential contribution to meeting the Union's objective of providing its citizens with an area of freedom, security and justice.

3. Despite these very positive interim conclusions, certain areas have emerged in which cooperation in criminal matters can be improved and the effectiveness of the EAW surrender mechanism increased. Thus, in 2018, during the Austrian Presidency, the Council adopted conclusions on mutual recognition in criminal matters, entitled 'Promoting mutual recognition by enhancing mutual trust'[1].

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018XG1213%2802%29.

In 2019, the Romanian Presidency issued a report entitled 'The way forward in the field of mutual recognition of judicial decisions in criminal matters'[2]. The Commission's latest implementation report of 2 July 2020[3], the ongoing ninth round of mutual evaluations in the Council, the draft implementation report of the European Parliament's LIBE Committee[4] of 4 September and the virtual conference on the future of the European arrest warrant held on 24 September 2020 in the context of the German Presidency have given the discussions on the future of the EAW new impetus.

4. There is scope for improvement in the following areas:

   A. National transposition and practical application

   B. Refusal to execute the EAW on the grounds of imminent violations of fundamental rights

   C. The procedure in the issuing State and the executing State

   D. Extradition of EU citizens to third countries

   E. Surrender procedures in times of crisis

A. National transposition and practical application

5. The efficiency and effectiveness of the EAW Framework Decision depend to a large extent on national legislation transposing the requirements of EU law in full. Despite the considerable efforts already made, there is, in view of the evolving case-law of the Court of Justice of the European Union (CJEU), still room for improvement. Member States should be encouraged to implement the recommendations resulting from the fourth and ongoing ninth rounds of mutual evaluations and from the Commission's implementation reports of 24 January 2006, 11 July 2007, 11 April 2011 and on 2 July 2020. The Commission should be encouraged to consider whether a timely follow-up report would be useful.

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[2] https://data.consilium.europa.eu/doc/document/ST-9728-2019-INIT/en/pdf.

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:270:FIN.

[4] https://www.europarl.europa.eu/doceo/document/LIBE-PR-655688_EN.pdf, European Implementation Assessment (EPRS): https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf.

6. In order to make it easier for legal practitioners to apply and interpret the national legislation implementing the EAW Framework Decision, Member States should be encouraged to lay down non-binding guidelines for the application of the European arrest warrant and to make them available to other Member States and the Commission.
7. In order to make it easier for legal practitioners to apply and interpret the EAW Framework Decision, the Council published a handbook on the European arrest warrant in 2008. The handbook has proven to be a valuable tool for practitioners. It was first revised by the Council in 2010 and then by the Commission in 2017. In view of the developments that have taken place in the meantime, in particular with regard to the large number of judgments by the CJEU, it would be useful to update the handbook in the near future. The Commission should be invited to look into the possibility of updating the handbook.
8. With regard to the case-law of the CJEU relating to the EAW Framework Decision, the Eurojust manual 'Case law by the Court of Justice of the EU on the European arrest warrant' has also proven to be a useful tool for practitioners. Eurojust should be encouraged to update this manual regularly.
9. The Member States and the Commission should be encouraged in their efforts to support continuous training for legal practitioners involved in EAW surrender procedures and to further promote the exchange of ideas between legal practitioners from different Member States. Direct contact between legal practitioners in different Member states enhances mutual trust and thereby contributes to a better application of the EAW Framework Decision. Possibilities for hosting specific training events for legal practitioners from two Member States with a high mutual case load should be explored, in order to promote mutual understanding.
10. Eurojust and the European Judicial Network (EJN) play a key role in the practical application of the Framework Decision. The COVID-19 pandemic has underlined the importance of these structures. Eurojust and the EJN should be encouraged to continue their valuable work and to intensify their efforts both to further improve the exchange of information, coordination and cooperation between national judicial authorities and to provide the best possible support for future cooperation with the European Public Prosecutor's Office (EPPO).

11. In order to further improve the application of the EAW Framework Decision, it would be useful to create a centralised database at Union level where all relevant information that could make it easier for legal practitioners to use the European arrest warrant would be collected and continuously updated. The Commission should be invited to examine, in consultation with Eurojust and the EJN, the options for creating a new database or expanding the EJN website[5].

B. Refusal to execute the EAW on the grounds of imminent violations of fundamental rights

12. It should be noted that the system put in place by the EAW Framework Decision is based on the principle of mutual recognition (recital 6; see also Article 82(1) TFEU) and while execution of the European arrest warrant constitutes the rule (art. 1 (2)), refusal to execute is intended to be the exception that can, in principle, only be envisaged in the circumstances set out in the Framework Decision (Articles 3 and 4). A possible violation of fundamental rights is not included in these provisions as specific grounds for refusal. At the same time, the Framework Decision does not have the effect of modifying Member States' obligation to respect fundamental rights and fundamental legal principles as enshrined in Articles 2 and 6 TEU and in the Charter of Fundamental Rights of the European Union (Article 1(3) and recitals 12 and 13).

13. Given this tension, the CJEU has recognised that, in specific cases, the executing judicial authority may, under certain, strictly defined conditions, refuse to execute the European arrest warrant where there is a real risk that the surrender of the person concerned could lead to inhuman or degrading treatment within the meaning of Article 4 of the Charter[6], due to the detention conditions in the issuing State, or to a violation of the fundamental right to a fair trial enshrined in Article 47(2) of the Charter[7], due to concerns about the independence of the judiciary in the issuing State. Legal practitioners have thus been given the difficult task of resolving the tension between mutual recognition and the protection of fundamental rights on a case-by-case basis.

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5 https://www.ejn-crimjust.europa.eu/ejn/EJN_DynamicPage/EN/85.

6 ECJ, 5. April 2016, C-404/15, Aranyosi and Caldararu; ECJ, 25. July 2018, C-220/18 PPU; ECJ, 15. October 2019, C-128/18, Dorobantu.

7 ECJ, 25. July 2018, C-216/18 PPU, LM.

Protection from inhuman or degrading treatment

14. The executing authority must carry out a two-step assessment where there are questions as to the detention conditions and a possible violation of Article 4 of the Charter. As a first step, the it must assess, on the basis of objective, reliable, specific and properly updated information, whether there are deficiencies with respect to the detention conditions in the issuing Member State, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. As a second step, it must assess specifically and precisely, in the light of the information provided and assurances given by the issuing Member State pursuant to Article 15(2) of the Framework Decision, whether, in the particular circumstances of the case, there are substantial grounds to believe that the individual concerned would, following his or her surrender to the issuing Member State, be exposed to a real risk of inhuman or degrading treatment because of the conditions for his or her detention in that State[8].

15. In order to ensure that legal practitioners receive the necessary support to be able to make the right decisions in individual cases, it would seem appropriate to initially propose short-term practical solutions. Possible measures include:

    a. *Improving access to the necessary information:* In December 2019, the European Union Agency for Fundamental Rights (FRA) launched the criminal detention database and published the report 'Criminal detention conditions in the European Union: rules and reality'. The FRA database combines, in one place, information from 2015 to 2019 on detention conditions in all EU Member States, drawing on national, European and international standards, case-law and monitoring reports. It would be useful to examine whether the database meets the needs faced in practice or whether it ought to be further developed. The database should also be maintained in the future, so that legal practitioners can access regularly updated information.

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[8] ECJ, 5. April 2016, C-404/15, Aranyosi and Caldararu; ECJ, 25. July 2018, C-220/18 PPU, paras. 88-94; ECJ, 15. October 2019, C-128/18, Dorobantu, paras. 52-55.

b. *Drafting a handbook for practitioners*: The Commission could be asked to draft, in consultation with Eurojust, the EJN and FRA, an appropriate aid for practitioners that would provide guidance on how to deal with the question of detention conditions and with the relevant case-law of the CJEU and the European Court of Human Rights (ECHR).

c. *Practical support in requesting supplementary information pursuant to Article 15(2) of the EAW Framework Decision:* Requesting supplementary information plays a central role in assessing the specific conditions in which the person concerned would be detained in the issuing State. In order to facilitate the work of legal practitioners, it might be useful to draft a template based on the issues that the case-law of the CJEU and the ECHR has shown to be critical when assessing detention conditions.

d. *Development of a follow-up mechanism for assurances:* The issuing State may provide assurances with respect to the specific conditions in which the person concerned would be detained. However, there is currently no mechanism for keeping track of the assurances given and ensuring compliance with them. The creation of such a mechanism would enhance trust in the assurances given and thereby enhance mutual trust as well. Such a mechanism could, for example, take the form of assigning one Member State task of following up on assurances that are given by another Member State to all other Member States, in order to reduce the workload and increase the expertise applied to the task.

16. However, the challenges relating to detention conditions in the issuing Member State must be addressed primarily in that Member State, and with regard to all detained persons. Practical solutions in the context of the execution of European arrest warrant can only be an auxiliary instrument to be used for a limited period. In the longer term, the adoption of an 'action plan on detention conditions' could be discussed. The action plan could include the following measures:

    a. *Modernising detention facilities*: The Member States should be encouraged to take the modernisation measures necessary to ensure the provision of decent detention conditions for all detained persons.

    b. *Twinning Projects – States helping States*: Exchange of experience on detention conditions both in the narrower sense (e.g. prison overcrowding, size of custody cells, sanitary conditions, time spent outside, access to healthcare, protection from violence, etc.) and in the broader sense (e.g. prison buildings, regimes and administration, training of prison staff, etc.), and alternatives to detention (e.g. electronic surveillance, alternative penalties and supervised early release programmes).

    c. *Strengthening alternatives to detention*: In this respect, the Council conclusions on alternative measures to detention[9], adopted during the Finnish Presidency, should be recalled and consideration should be given as to whether the necessary action has been taken to follow up on them.

    d. *Making use of existing instruments and monitoring mechanisms*: Minimum standards and benchmarks on detention conditions already exist in form of recognised soft-law instruments such as the Council of Europe's 'European Prison Rules'. The Member States should be encouraged to ensure compliance with these instruments. The role of existing monitoring mechanisms, in particular the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the National Prevention Mechanisms (NPMs) established under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), should also be strengthened.

[9] OJ C 422, 16.12.2019, p. 9.

Right to a fair trial

17. Just as in the event of an alleged risk of breach of Article 4 of the Charter, where there is an alleged risk of breach of Article 47(2) of the Charter, the executing judicial authority must conduct a two-step-assessment. As a first step, it must assess, on the basis of objective, reliable, specific and properly updated material concerning the operation of the judicial system in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State owing to systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. As a second step, it must assess specifically and precisely whether, having regard to the personal situation of the person concerned, as well as to the nature of the offence and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the Framework Decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to the issuing State[10]. Other preliminary references concerning the carrying out of this assessment are currently pending[11].

18. Application of these principles is a major challenge for legal practitioners. Ensuring respect for the rule of law in the EU and strengthening mutual trust is a primary responsibility of the Member States and the Union institutions. The fact that judicial authorities involved in EAW surrender procedures are currently called on to assess, on a case-by-case basis, the overall functioning of the judicial system in another Member State is both regrettable and creates the risk of a politicisation of cooperation in criminal matters. Gaining access to objective, reliable, specific and properly updated material is difficult. Carrying out the second step in the assessment is equally challenging. If mutual trust in the rule of law has been undermined, the instruments for information exchange under Article 15(2) of the Framework Decision and for the provision of assurances are also of limited use. Here too, legal practitioners could be assisted by improving access to information and by providing practical guidelines on how to handle such cases.

[10] ECJ, 25. July 2018, C-216/18 PPU, LM, paras. 61, 68, 79.

[11] See the pending proceedings in joined cases C-354/20 PPU and C-412/20 PPU (Openbaar Ministerie e.a.).

Ways forward

19. In the light of the aforementioned considerations, an in-depth discussion is needed on whether practical solutions are sufficient to meet the current challenges in dealing with the risk of violations of fundamental rights as a consequence of surrender to the issuing State.

20. In this respect, it should be recalled that the question of how to deal with the risk of fundamental rights violations also arises in the context of other instruments that rely on the principle of mutual recognition. However, the instruments in question may also address the issue in quite different ways, which is the case, for instance, with Article 11(1)(f) Directive 2014/41/EU on the European Investigation Order and Article 8(1)(f) of Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders. The requirements for refusal of requests based on the instruments mentioned above are partly different from those laid down by the CJEU in relation to the EAW Framework Decision. The resulting inconsistency poses difficulties for legal practitioners.

21. Against this background, consideration could be given to whether it might be useful to have – following the example of Framework Decision 2009/299/JHA – a precise, uniform and horizontal basis for dealing with cases where there is a real risk that the execution of the request may lead to a serious violation of fundamental rights. This would eventually also lead to better and more efficient protection of requested persons' fundamental rights.

C. The procedure in the issuing State and the executing State

22. Considerable progress has already been made with respect to the procedural rights of suspected or accused persons in criminal proceedings. On 30 November 2009, the Council adopted a Resolution on a roadmap for strengthening procedural rights in criminal proceedings, which provided for a step-by-step approach to establishing common minimum standards. The European Council made this roadmap part of the Stockholm programme that was adopted on 10 December 2010.

23. To implement the roadmap, common minimum requirements for criminal proceedings were established by Directive 2010/64/EU (right to interpretation and translation), Directive 2012/13/EU (right to information), Directive 2013/48/EU (right of access to a lawyer), Directive (EU) 2016/343 (presumption of innocence, right to be present at the trial), Directive (EU) 2016/800 (procedural safeguards for children), Directive (EU) 2016/1919 (legal aid).

24. The Commission's implementation reports, published on 18 December 2018 regarding Directives 2010/64/EU and 2012/13/EU and on 26 September 2019 with respect to Directive 2013/48/EU, show that there is still a clear need for improvement. The Member States need to be encouraged to remedy the shortcomings identified in the implementation reports and ensure full and correct implementation of the Directives.

25. In addition, it would seem useful to assess the practical effectiveness of procedural rights in proceedings in the issuing and executing Member States under the EAW Framework Decision. The report published by FRA on 13 September 2019 ('Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings'), which covers the situation in eight Member States, is a valuable contribution in this regard.

26. The procedure could be simplified and accelerated if Member States could agree to accept one language as a carrier language for the translation of the European arrest warrant. Member States should therefore be invited to consider whether they could make greater use than at present of the possibility provided for in Article 8(2) of the EAW Framework Decision.

D. Extradition of EU citizens to third countries

27. At the informal videoconference of justice ministers on 4 June 2020, during the Croatian Presidency, there was an exchange on the state of play regarding the handling of extradition requests from third countries concerning EU citizens who are not nationals of the requested Member State.

28. The CJEU addressed this issue in the *Petruhhin case* and several subsequent rulings[12]. The requested Member State is faced with two obligations. On the one hand, it has a duty to fulfil existing obligations under international law and to combat the risk that the offence concerned will go unpunished. On the other hand, Member States that do not extradite their nationals are obliged, in accordance with Articles 18 and 21 TFEU, to protect citizens from other Member States as effectively as possible from measures that may deprive them of the rights of free movement and residence within the EU. In that regard, the CJEU has clarified that the requested Member State must ascertain whether there is an alternative measure which would be less prejudicial to the exercise of the rights conferred by Article 21 TFEU and which would be equally effective in achieving the objective of preventing impunity[13]. This includes informing the Member State of which the person concerned is a national and surrendering the requested person to that Member State in application of the EAW Framework Decision, provided that said Member State has jurisdiction to prosecute that person for offences committed outside national territory[14].

29. The application of the *Petruhhin* principles has proven difficult in practice. However, considerable work has been done to provide insight into their practical application by Member States dealing with extradition requests from third countries[15]. The exchange at the informal videoconference of justice ministers on 4 June 2020 showed that the Member States consider it necessary to improve the exchange of information between the states involved in such cases. In addition, there was support for the Presidency's proposal to invite Eurojust and the EJN to analyse how requests for the extradition of Union citizens by third countries are handled in practice.

30. The results of this analysis should be awaited before moving forward. Moreover, the CJEU is expected to render another decision in the foreseeable future that will provide further details relevant to the practical application of the *Petruhhin* principles. [16]

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[12] ECJ, 6 September 2016, C-182/15, Petruhhin; ECJ, 10 April 2018, C-191/16, Pisciotti; ECJ, 13 November 2018, C-247/17, Raugevicius; ECJ, 2 April 2020, C-897/19 PPU, Ruska Federacija; see pending case C-398/19, Generalstaatsanwaltschaft Berlin.

[13] ECJ, 6 September 2016, C-182/15, Petruhhin, paras. 41, 47-50.

[14] ECJ, 6 September 2016, C-182/15, Petruhhin, paras. 41, 47-50.

[15] See Council documents 10429/17, 15786/17, 15207/17.

[16] See pending case C-398/19, Generalstaatsanwaltschaft Berlin and Advocate General Hogan's opinion published on 24 September 2020; pending case C-505/19 – Bundesrepublik Deutschland.

31. Following this analysis, a discussion should be held in COPEN in a timely manner on the question of whether any follow-up action should be taken and, if so, in what form. In particular, it should be clarified whether it would make sense for the Member States to adopt a uniform approach to handling extradition requests from third countries that concern EU citizens, and whether such an approach should be set out in EU guidelines.

32. When discussing how to deal with potentially abusive requests from third countries, consideration should be given not only to issues of extradition, but also to international search instruments, in particular INTERPOL, so that the arrest of the person concerned can be avoided in the first place.

E. Surrender procedures in times of crisis

33. To prevent the spread of COVID-19, Member States have taken a variety of measures, such as closing borders, suspending air traffic and imposing strict contact and social distancing rules. This has also had a significant impact on judicial cooperation in criminal matters, in particular on surrender procedures under the EAW Framework Decision. At the informal videoconference of the COPEN Working Party on 9 July 2020, there was an exchange of experience on the management of the first months of the COVID-19 pandemic and the lessons learned (9078/20).

34. Ensuring the proper functioning of judicial cooperation in criminal matters in times of crises is of great importance for the area of freedom, security and justice. COVID-19 has highlighted the importance of the coordinated and swift exchange of information and experience and the need to further digitalise cooperation between the Member States.

35. With regard to the necessary exchange of information and experience in times of crisis, the following findings should be noted:

    a. To avoid duplication of work and streamline the collection and distribution of information, a coordinated approach by all actors involved is vital;

    b. Questionnaires have proven to be a valuable instrument for collecting information;

c. The regularly updated compilation by Eurojust and the EJN (see WK 3472/2020 REV 19), combining information received by Eurojust, the EJN and the Presidency/General Secretariat of the Council, has proven to be a valuable tool for the coordinated exchange of information and of great assistance to legal practitioners; consideration should be given to creating an electronic platform on which the information received can be consulted and updated on a daily basis;

d. The EAW Coordination Group set up by the Commission could be a means of improving cooperation and rapid information exchange, in times of crisis, between the various actors involved in the application of the EAW Framework Decision. To achieve this objective, the size and composition of the group could be defined in more detail. The Commission has announced that it will present a non-paper to define more precisely the tasks of the EAW Coordination Group and to clearly distinguish its role from that of other bodies.

36. In times of crisis, digitalisation plays a central role. The COVID-19 pandemic has clearly illustrated the need for a profound digitalisation of cross-border judicial cooperation. In many cases, practical issues can be overcome by means of digital solutions. The Commission's final report on the study on 'Cross-border Digital Criminal Justice', published on 4 September, marks an important step forward in that regard. In any measures adopted as follow-up to this study, particular attention should be paid to the following aspects:

    a. The creation of secure electronic communication channels between judicial authorities;

    b. The harmonisation of the systems for electronic signatures, or at least a more flexible use of the existing systems;

    c. The creation of a secure means of transmitting large files;

    d. Better alignment of videoconferencing systems.

F. Other issues

37. *Proportionality*: Considering the considerable impact that the execution of a European arrest warrant has on the requested person's liberty, the issuing judicial authorities should consider assessing a number of factors before issuing the European arrest warrant. These factors include in particular: the seriousness of the alleged offence; the interests of the victims; the likely penalty if the person is found guilty; and, crucially, whether other judicial cooperation measures that are less coercive than the European arrest warrant EAW (e.g. European Investigation Orders, European Supervision Orders, transfer of prisoners), but also effective, could be used instead.

38. *List of 32 offences*: If one of the 32 offences listed in Article 2(2) of the EAW Framework Decision is involved, double criminality need not be verified. Some have called for this list to be revised, while others have called for the offences to be defined more precisely. Article 2(3) provides for the possibility of adding other categories of offence to the current list.