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NOTE

From: General Secretariat of the Council
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Delegations will find in the Annex the above-mentioned document.

**57TH PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK
UNDER THE SLOVENIAN PRESIDENCY OF THE COUNCIL OF THE EU
18-19 OCTOBER 2021**

EJN CONCLUSIONS

**HEARING BY VIDEOCONFERENCE WITHOUT THE INVOLVEMENT
OF THE EXECUTING MEMBER STATE**

BACKGROUND INFORMATION

In many aspects, the technical development is advancing the evolvement of the legal framework, and the international legal cooperation in the criminal matters is not an exception.

COVID-19 has accelerated the use of videoconference. It has become a necessity not only in the national proceedings, but also in criminal cases with cross-border dimensions. The growing popularity of this measure has led to the question whether there is a legal possibility to organize the videoconference abroad without involving the authorities of the executing state, especially in the cases where a participant (be it an accused, a victim or a witness) has given his/her consent to participate in the trial remotely.

The international legal framework foresees that either a European Investigation Order or an MLA request is needed to interview a person located in another country via videoconference.

Traditionally, there are **three main reasons why the executing State should be involved** in the execution of the videoconference:

1. technical means for enabling the videoconference to take place;
2. the competence of the executing State to summon a person to appear at the videoconference and to use coercive measures if he/she ignores the summons;
3. the respect of the sovereignty of the executing State where the accused/victim/witness/expert is located.

All the mentioned points, however, can be a matter for discussion. Nowadays almost everyone possesses a technical device that would allow him/her to participate in the trial remotely regardless of the location. Therefore, **technical assistance of the authority of the executing State is rarely necessary for enabling a person to connect to a trial.**

Furthermore, **when a person gives consent** to participate at the trial via videoconference, no coercive power pertaining to the authorities of the executing State is necessary to compel him/her to appear at the trial, thus there is **no need to involve authorities** due to this reason. On the contrary, the involvement of the executing State would not only be disproportionate, but also inefficient (time, organisation, translations and other resources).

In addition, when conducting a videoconference on foreign territory with the **consent of an accused person/victim/witness/expert, it is debatable whether this must be seen as a violation of the sovereignty** of the state where a person is located. Theoretically, the same approach could be taken as provided for in Article 31 of the EIO Directive, where a notification system has been introduced. After all, hearing a person via videoconference is not the same as house searches, seizure of property, covert operations or wiretapping etc.

The principle of trust and mutual recognition between the EU Member States is another reason why at least within the EU it could be possible to allow the court of one Member State to interview a person located in another Member State via videoconference, without involving the latter.

To gather the opinion of the experienced practitioners, during the EJM Plenary meeting the EJM Contact Points were invited to share the knowledge on how videoconferences are conducted in their country, in both domestic and cross-border proceedings. In addition they also presented their views whether and how it could be possible to modernize the international legal framework to make the execution of this measure smoother and faster.

CONCLUSIONS

1. Does the current international legal framework allow conducting a cross-border videoconference with a person (accused/victim/witness/expert), without the involvement of the State where the person is located? Would it be allowed according to the national legislation?

In general, the national legislation of the majority of the Member States foresees no obstacles in using videoconferences in the national criminal procedure during the trial stage. However, many countries have requirements that limit the possibilities; either because the consent of the person is needed or videoconference cannot take place regarding the accused person, but only for hearing witnesses, victims or experts.

During a traditional videoconference, a state official must be present along with the person that is being heard. However, due to the COVID-19 crisis, some Member States made amendments in the criminal procedure law that allowed the courts, in their domestic proceedings, to send to a person a direct link enabling him/her to join the trial remotely from any technical device that enables video and audio transmission (even a smartphone). Same as with the traditional videoconference, there are still certain legal limitations related to consent and status of a person. The mandatory audio and video recording of the court hearing where the videoconference is taking place is also considered.

Extrapolating this innovative approach to cross-border criminal cases, the absolute majority of the Member States do not approve the possibility to interview a person from abroad directly through a video link without sending a European Investigation Order or MLA request to the country in question. Even Member States that generally have a more liberal position admit that such a possibility would be very advanced and therefore further in-depth analysis would be needed.

2. Are changes in the international legal framework needed/desirable to allow conducting videoconferences without the involvement of the State where the person is located?

While the current international legal framework obliges countries to send an EIO or MLA request whenever an investigative/procedural measure must be executed abroad, the rising number of videoconferences, the enhanced mobility of people and modern technical solutions are the main reasons for considering a change.

However, several issues have to be examined:

1. **Security** of the device, application and transmission of data – how to ensure that a device used by a person is not infected with a malware that could provide access to information to third parties;
2. **Identity, security and reliability** of the person to be interviewed – how can the court or any other official verify that the right person is heard? And how is it ensured that the person can speak freely, i.e. that there are no other persons present during the hearing, whose presence could be harmful for the person that is heard or for the procedure; reliability of the statement? The **fundamental rights** must be guaranteed and respected, e.g. the presence of a lawyer;
3. **Confidentiality** of the procedure, especially in sensitive cases;
4. **Admissibility** of evidence acquired in this way, and the possibility to **recognize judgments**;
5. Whether the **sovereignty** of a country would be violated, especially if the person consents to be heard remotely and if the technical means do not involve the country where the person is heard, e.g. if the servers used are located in the issuing state;
6. Which **procedural rules should be applied**? The rules of the country conducting the interview or the country where the person is located? It has to be borne in mind that there are differences in the Member States regarding the age and status of the person to be heard, the scope of the hearing and possibly other aspects.

Despite the issues that were brought forward, the EJM Contact Points expressed the opinion that a new and more modern regulation regarding videoconferences should be considered.

3. Should the EJM take an initiative for such a change of the legal framework?

The EJM is the most appropriate forum for exchanging views regarding the challenges that international legal cooperation brings. International legal acts are made for the practitioners and it is important that their opinion is heard and respected. In the context of the discussion whether the procedure for cross-border videoconference has to be simplified, the EJM should be used as a way to transmit the opinion of the experts to the legislative power for considerations of possible changes in the legal framework that could make the practical work more effective and efficient, yet not jeopardizing the fundamental rights and principles of international cooperation.

Since the possibility of conducting direct videoconferences in cross-border case would be a significant change in the legal framework that brings up a number of sensitive questions, it requires a thorough analysis. The EJM considers that setting up a working group of experts would allow evaluating whether such changes are realistic. The working group would have to take into account all potential risks and also suggest solutions.
