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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: 53rd Plenary meeting of the European Judicial Network
- Conclusions on current developments on the application of the EAW

Delegations will find in the Annex Conclusions on the European Arrest Warrant (EAW) as resulting from the 53rd Plenary meeting of the European Judicial Network (EJN) (Helsinki, 20-22 November 2019).



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53RD PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK

UNDER THE FINNISH EU COUNCIL PRESIDENCY 2019

EJN CONCLUSIONS

CURRENT DEVELOPMENTS ON THE APPLICATION OF THE EAW

Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW FD) remains one of the most frequently used legal instruments in the field of judicial cooperation in criminal matters. The cases involving execution of European Arrest Warrant (EAW) are very often facilitated by the EJN Contact Points¹. This is why it is essential for the EJN to closely monitor and to regularly reflect on the developments in the practical application of the EAW. This allows for better understanding of the differences in the procedures at the national level and facilitates the resolution of emerging legal issues.

¹ More than 1800 EJN EAW cases have been reported by the EJN Contact Points for 2017-2018.

The 53rd EJM Plenary meeting provided another forum for the EJM Contact Points to discuss various aspects of the application of the EAW. The discussions built on the deliberations and conclusions from the 52nd EJM Plenary meeting under the Romanian Presidency of the Council of the EU, with regards to the judgments of the Court of Justice of the European Union (CJEU) on the interpretation of the term “issuing judicial authority” of Article 6(1) EAW FD as well as on detention conditions. In addition, the meeting also addressed questions on the use of EAW in relation to surrendering nationals and residents of the executing Member State, matters related to *in absentia* procedures, proportionality for issuing EAWs for questioning of defendants and the possibility to issue an EIO for hearing a defendant via videoconference in the court session.

The EJM has collected a lot of valuable information for the practitioners in the Member States on different aspects of the application of the EAW. The EJM Secretariat will introduce an EAW designated area on the EJM website where the information will be organised in topics for easy access for the practitioners.

I. EAW'S REGARDING *IN ABSENTIA* JUDGMENTS: SURRENDER OF NATIONALS OR RESIDENTS OF THE EXECUTING STATE

Background information

The EAW FD allows the executing Member State to refuse the surrender of its own citizens or residents if the EAW has been issued for the purposes of execution of a custodial sentence or detention order. The EAW FD also allows the executing Member State to make the surrender of a national or resident of the executing Member State subject to a guarantee that the person is returned to the executing Member State in order to serve there the custodial sentence passed against him or her in the issuing Member State. The system established by the EAW FD, makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence should be executed on the territory of the executing Member State. Such provisions are foreseen in Article 4 and Article 5 of the EAW FD to ensure the reintegration of the sentenced persons in the society² - in particular Article 4(6) EAW FD and Article 5 (3) EAW FD.

Over the years the CJEU has accumulated jurisprudence on the interpretation of Articles 4(6) and 5(3) of the EAW, laying down guidance as to their application on the national level.

During the 53rd EJM Plenary meeting, the EJM collected information on the practice in the Member States with regard to the implementation and application of the respective provisions on refusals for surrender and also addressed matters related to *in absentia* judgments and execution of EAWs for such judgments.

² Case C- 123/08 *Wolzenburg* (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-123/08>), para. 62

Discussions and conclusions:

The EJM Contact Points discussed the national procedures in situations of requested surrenders of own nationals or residents in the countries. Throughout the discussion it became apparent that the Member States have implemented and are applying Article 4(6) EAW FD in a similar manner. They have introduced either **mandatory or optional ground for refusal of the surrender of their nationals and residents** in their Member State. The Contact Points presented their national systems and concluded that some of the Member States have established practice in assessing **additional considerations when refusing the execution of an EAW with regards to residents** in their countries such as length of residence and other ties to the country, e.g. work and family.

The discussion brought also considerations from the daily practice of the Contact Points that noted the **link between refusal to execute an EAW pursuant Article 4(6) EAW FD and the consequent decision to undertake the execution of the sentence and Article 25 FD 2008/909³ on Custodial Sentences**. Member State base the decision to execute the sentence either directly on the EAW FD or via the Custodial Sentences FD. The Contact Points also pointed to the need for closer coordination between the national authorities in situations where a person is subject both to an EAW and FD 2008/909.

As for ***in absentia* judgments**, the Contact Points confirmed that an EAW issued for the purpose of enforcing such judgments may be executed in case the conditions in Article 4a EAW FD have been fulfilled. The vast majority of the EJM Contact Points also clarified that refusal for surrender based on Article 4(6) would **be applicable in situations of execution of *in absentia* judgments**.

A practical question raised during the discussions was related to situations where the sentenced person (a national or resident of the executing state) announces in the executing state of the EAW that he or she **would not request a retrial** (or appeal against the *in absentia* judgment) and whether such statement would be binding on the executing authorities or they still have to surrender the person. From the discussions the EJM Contact Points concluded that this is an area where there are different practices in the Member States – in some Member States a statement from the accused person is accepted, whereas in other Member States the person still have to be surrendered in order for him or her to give the statement personally to the issuing state.

³ 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 Union.

Role of the EJM

Information on the EJM website: The EJM Contact Points observed that the matters of *in absentia* and the national procedures determining *in absentia* vary across the EU. The Contact Points concluded that it would be useful for the practitioners if the EJM gathers information on national procedures related to *in absentia* such as summoning and delivery of procedural documents and possibility for retrial. As a starting point, a systematic overview of the CJEU case-law interpreting “*in absentia*”, should be arranged in the Judicial Library on the EJM website.

II. CHOOSING BETWEEN EAW AND EIO FOR QUESTIONING DEFENDANTS: PROPORTIONALITY TEST

Background information

One of the core principles of the EAW FD is the proportionality of the EAW as the issuing of such measure should always be justified in the specific case. The proportionality of the measure is determined on the basis of several factors⁴ such as: (a) the seriousness of the offence; (b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); (c) the likelihood of detention of the person in the issuing Member State after surrender; (d) the interests of the victims of the offence.

During the 53rd EJM Plenary meeting, the EJM Contact Points considered the possible use of hearing a suspected or accused person by videoconference as an alternative to issue an EAW. They also discussed the possibility to use videoconference to organise a retrial for the sentenced person in the case of an *in absentia* judgment.

⁴ European Commission notice of 28.9.2017, *Handbook on how to issue and execute European Arrest Warrant*, point 2.4.

Discussions and conclusions:

In view of a **proportionate use of the EAW**, recital 26 of the Directive 2014/41/EU on the EIO states that, hearing the suspected/accused person by **videoconference** could be considered as an alternative measure. Most of the EJM Contact Points, however, concluded that, as an issuing State, such an alternative measure would not be admissible in accordance with their national procedural law. Some of them noted that it could be possible to execute an incoming EIO for hearing by videoconference.

With regards to *in absentia* judgments and the question on whether it would be possible for the Member States to organise a **retrial or appeal trial by hearing the sentenced person via videoconference** (EIO) and allowing the person to be heard in the country of nationality or residency, some of the Contact Points concluded that this would not be possible under their national law, whereas others expressed that it would be possible, but only in minor cases. In addition, also **practical reasons** against the use of videoconference were brought forward, such as how to ensure an effective “presence” of the defendant throughout the trial, the presence of a lawyer, interpretation and costs.

Role of the EJM

Update of Fiches Belges: On the basis of the discussions the EJM concluded that it may consider adding more detailed information on videoconference hearings and EIOs in the Fiches Belges on the EJM website.

III. PUBLIC PROSECUTOR AS AN ISSUING JUDICIAL AUTHORITY

Background information

On 27 May 2019 the CJEU delivered judgments in the Joint Cases C-508/18 and C-82/19 PPU⁵ and Case C-509/18 PF⁶. All three cases elaborated on the question, whether a public prosecutor is a judicial authority within the meaning of Article 6(1) of the EAW FD. In these judgments the Court ruled that the autonomy of the public prosecutor is a governing factor on whether or not it should be considered competent to issue EAWs. The Court, however, also considered another aspect of the autonomy of the public prosecutor, namely the possibility to afford on the national level an “effective judicial protection” and to that end – possibility to legally challenge the prosecutor’s decision to issue an EAW and particularly, in relation to the proportionality of such a decision.

Following the conclusions of the 52nd EJM Plenary meeting, the EJM continues to closely monitor the developments in the jurisprudence of the CJEU with regards to further interpretation of “competent judicial authority” in Article 6(1) EAW FD. In that regard the EJM noted the pending cases before the CJEU (i.e. C-566/19, C-625/19 PPU, C-626/19 PPU and C-627/19 PPU) in which the CJEU is expected to further elaborate on the concept of “effective judicial protection” with regards to situations where under the law of the issuing state a public prosecutor is the “issuing judicial authority” (Article 6(1) EAW FD). Also, the judgments are expected to assess the notion of “independence” in a situation where the prosecutor’s offices are structured in a hierarchical structure.

⁵ Joined cases C-508/18 and C-82/19 PPU (<http://curia.europa.eu/juris/liste.jsf?num=C-508/18&language=en>)

⁶ Case C-509/18 Minister for Justice and Equality v PF (<http://curia.europa.eu/juris/liste.jsf?num=C-509/18>)

Discussions and conclusions:

The EJM Contact Points agreed that the two judgments rendered in May 2019 of the CJEU had a great direct impact on the procedures concerning the issuing and executing of the EAWs. In anticipation of the judgments on the pending cases as well as the opinion of the Advocate General⁷, the EJM discussed about the possibility to legally challenge the decision of a prosecutor to issue an EAW and the existence for such possibility under the national procedural laws of the Member States. It was noted that in a number of Member States, although the prosecutor is independent and autonomous, **there is no possibility under their national law to appeal before a Court the decision of the prosecutor to issue an EAW.**

It was noted that depending on the interpretation that the CJEU would give on this criteria in the pending judgments **it might be necessary for Member States to introduce changes in the national laws** in order to introduce a legal remedy to challenge the EAW before a Court. The EJM Contact Points concluded that if this would be the outcome, an **appropriate transitional period should be granted to the Member States** to bring their national laws in line with the judgments of the CJEU. In the absence of such a transitional period, there **may be situations where detainees pursuant to an EAW must be released**, if the issuing Member State does not have such a legal remedy.

The EJM Contact Points noted the **added value of the compilation⁸ prepared by Eurojust** in relation to the CJEU's judgments delivered in May 2019 on the interpretation of Article 6(1) EAW FD and the concept of public prosecutor as issuing judicial authority in the Member States. The EJM welcomes the opportunity to work together with Eurojust on expanding the compilation (currently a Eurojust/EJM joint note) with more information on the national laws and procedures of the Member States and especially with respect to the involvement of the Court and the existence of legal remedy to challenge EAWs. The EJM agreed that **further expansion of the compilation should take place only after the CJEU delivers the pending judgments** in order for the EJM and Eurojust to collect the most accurate and relevant information from the Member States.

⁷ The opinion of the AG was issued on 26.11.2019

⁸ Published as Council doc. 10016/19

Role of the EJN

Facilitating exchange of information: The EJN should keep supporting the national authorities in facilitating the communication between the competent authorities and providing information, when requested, on the national law and the structure of the judicial system. Additionally, the EJN will regularly update the EJN website in case new information related to the case-law becomes available.

Follow-up and adding information to the Eurojust/EJN compilation: The EJN should continue to closely follow the developments in the jurisprudence of the CJEU in the pending judgments. The EJN is committed to complement the compilation, together with Eurojust, with relevant information on the national systems and procedural laws in case questions arise right after the judgments are delivered.

IV. DETENTION CONDITIONS - JUDGMENT OF THE CJEU IN THE CASE C-128/18 (DOROBANȚU CASE)

Background information

On 15 October 2019 the CJEU delivered its judgment in the *Dorobantu case*⁹ concerning considerations of prison conditions in surrender procedures in the execution of EAWs. The Court concluded that in cases where the executing judicial authority has objective and properly updated information indicating to systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing state, it must take account of all the relevant physical aspects of the conditions of detention in the prison that would have an impact on the detainee. That assessment is not limited to the review of obvious inadequacies.

⁹ Case C-128/18 *Dumitru-Tudor Dorobantu* (<http://curia.europa.eu/juris/liste.jsf?num=C-128/18>)

Furthermore, the Court stated that for the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority¹⁰, in the absence of any specific indications that the conditions of detention infringe Article 3 of the European Convention on Human Rights (ECHR) and Article 4 of the Charter of Fundamental Rights.

The impact of the jurisprudence of the CJEU with regards to the detention conditions has been a subject of discussions during the 52nd Plenary meeting of the EJM under the Romanian EU Council Presidency in June 2019, in view of the Advocate General's opinion in the case on 30 April 2019.

Discussions and conclusions:

During the discussions, the EJM Contact Points confirmed that at present it is a common practice that detention conditions in the detention facilities of the Member States are subject to detailed considerations in surrender procedures in the execution of EAWs. The Contact Points agreed that **the latest judgment of the CJEU in *Dorobantu* case is not expected to bring a major impact on the procedures** in the Member States as they have been already closely observing previous judgments of the CJEU and of the European Court of Human Rights concerning detention conditions. The Contact Points confirmed that it is a common practice for them, pursuant the judgment of the CJEU in *Aranyosi and Căldăraru* case, to request supplementary information from the issuing Member State on the detention conditions¹¹ to which the sought person would be exposed pursuant to the surrender, in order to determine if the detention conditions would breach the human rights protection ensured by Article 3 ECHR and Article 4 of the EU Charter. The practice in the Member States is that they are also **observant of the particular requirements on the personal detention conditions.**

¹⁰ Ibid para 67-68

¹¹ Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (<http://curia.europa.eu/juris/liste.jsf?num=C-404/15>), para 104

The EJM Contact Points, however, noted that they consider that in some situations the criteria enlisted in the jurisprudence is very strict and difficult for some Member States to comply with. The EJM concluded that **the conditions of the detention conditions applicable to the individual cases should be assessed with a more holistic approach** – taking into consideration also other parts of the facility such as the common areas.

Role of the EJM

Information on the EJM website:

- a) On detention conditions - The EJM Contact Points considered what information on detention conditions would be relevant to have on the EJM website. They agreed that it would be useful to have a part on detention conditions in the coming designated EAW section of the website, including relevant information and reports of detention facilities from specialised organisations such as Council of Europe and Fundamental Rights Agency.
- b) On competent authorities for issuing assurances – The EJM will follow up on the conclusion from the 52nd EJM Plenary meeting to collect information on the competent authorities in the Member States to issue assurances regarding detention conditions.