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Subject:	The impact of COVID-19 on judicial cooperation in criminal matters - Executive summary of information compiled by Eurojust and EJN

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Delegations will find attached an executive summary of the compilation by Eurojust and by the European Judicial Network (EJN) of information received by Eurojust, by the EJN and by the Presidency/General Secretariat of the Council, on the impact of the measures taken by governments to combat the spread of COVID-19 on judicial cooperation in criminal matters in the European Union (and Iceland and Norway) and on the way forward.

The text has been updated with input received by Friday 12 February 2021.

**The impact of COVID-19 on judicial cooperation in criminal matters****Executive summary of Council doc. WK 587/2021 REV 2****Executive summary**

The measures taken at the national level to combat the spread of the coronavirus (COVID-19) have had a significant impact on judicial cooperation in criminal matters in the European Union, Iceland and Norway.

In March 2020, the Council submitted a first questionnaire to the Member States, Iceland and Norway on the impact of said national measures on judicial cooperation instruments. In parallel, Eurojust and EJM collected information from the Member States on the same topic. In view of the rapidly evolving situation, new questions were then regularly submitted to the Member States, Iceland and Norway by said actors. In light of these developments, in April 2020 the Council gave a mandate to Eurojust and EJM to prepare a compilation of all the information collected so far, to submit new questions to the Member States, Iceland and Norway where needed, and to regularly update the compilation in order to continuously assist practitioners in the application of judicial cooperation instruments in criminal matters in these challenging times.

In June 2020, the Council published a compilation of the Member States' replies to a Questionnaire on the impact of COVID-19 on SIRENE work on surrenders, extraditions of persons and transfers of convicts (Council doc. WK 6425/2020 INIT) which was integrated in the 11<sup>th</sup> revision of the compilation (Council doc. WK 3472/2020 REV 11).

The present executive summary gives an overview of the main practical and legal issues identified from an analysis of the replies included in the 2<sup>nd</sup> revision of year 2021 of the compilation (Council doc. WK 587/2021 REV2) on the following legal instruments and topics:

- Framework Decision 2002/584/JHA on the European Arrest Warrant<sup>1</sup>;

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<sup>1</sup> To Republic of Iceland and the Kingdom of Norway applies the Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.

- Extradition from/to third States;
- Directive 2014/41/EU on the European Investigation Order;
- Mutual legal assistance in criminal matters;
- Framework Decision 2008/909/JHA on the transfer of sentenced persons;
- Framework Decision 2003/577/JHA on freezing orders<sup>2</sup>;
- Framework Decision 2006/783/JHA on confiscation orders<sup>3</sup>;
- Framework Decision 2002/465/JHA on Joint Investigation Teams.

In several States the situation improved considerably since May 2020, and more notably in June. Since then, the execution of judicial cooperation instruments gradually went back to normal and several States declared the end of the state of emergency. This situation went on towards the end of October, where notwithstanding the evolution of the pandemic situation of COVID-19, the contributing States reported that the general health and restricting measures had no significant impact on the execution of judicial cooperation instruments.

Although November 2020 saw a recrudescence of the COVID-19 pandemic, with more stringent health and safety measures progressively implemented towards the beginning of year 2021 up to now, the contributing States highlighted that there has been no major and noteworthy impact on the execution of judicial cooperation instruments, as a whole.

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<sup>2</sup> Replaced by REGULATION (EU) 2018/1805 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the mutual recognition of freezing orders and confiscation, that entered into force on 19 December 2020.

<sup>3</sup> Replaced by REGULATION (EU) 2018/1805 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, that entered into force on 19 December 2020.

## 1. European arrest warrants

The surrender procedure under the Framework Decision on the European Arrest Warrant (EAW FD) is the main focus of the compilation. European Arrest Warrants (EAWs) have a direct impact on the personal freedom of the requested person – or at least give rise to a restriction of their freedom of movement - and is by nature an urgent proceeding in all its phases, as provided in Article 17(1) EAW FD. The COVID-19 crisis had an **impact on both the issuing and the execution of EAWs**. However, at the beginning of June and up to the beginning of October 2020, some States noted that the gradual opening of the borders and resuming of flights slowly brought the situation back to normal, allowing the actual execution of EAWs. However, persisting limitations in commercial flights, both as to their frequency and destinations, continued to represent an obstacle as to the surrender procedures. Lately, the obstacle represented by flight limitations had been reaffirmed by the increased level of restrictions and health measures in place to contain the recent developments of COVID-19 situation.

### *Impact on the issuing of EAWs*

In relation to the issuing of EAWs, the vast majority of EU judicial authorities have continued to issue EAWs as normal. Yet, some States prioritised the issuing of EAWs, either following the adoption of specific guidelines issued by the public prosecutors' offices, where public prosecutors are the issuing authorities or nevertheless trigger the issuing procedure (e.g. limiting the issuing of EAWs only to urgent or very serious cases), or as an indirect result of the general limitations on judicial activities during the pandemic. Whilst, at one stage a number of States reported that the activities of the judicial authorities largely resumed, gradually returning to their regular service. Lately, in the light of the current developments of the health crisis, a few States reported that they issue EAW only in urgent cases or for cases involving serious criminal offences.

### *Impact on the execution of EAWs and the actual surrender by air or by land*

As to the execution of EAWs, in general terms, the proceedings opened in the executing State for the recognition and execution of EAWs were not affected and were carried out normally without significant impediments. However, the measures adopted in the context of the COVID-19 crisis are having a **major impact** on the last phase of the surrender procedure, as they often lead to difficulties in carrying out **the actual surrender of the requested person** to the issuing State after a judicial decision to this effect has been taken and became final. While no State has generally suspended the execution of surrenders, in specific cases it may become impossible to transfer the requested person to the issuing State due to the practical and legal measures adopted at national level to combat the COVID-19 crisis. This is the case, for instance, where travel restrictions and flight cancellations are in place, or there are restrictions in place for the escorting officers to travel abroad preventing the issuing State from taking over the requested person. In this respect, the feasibility of each transfer needs to be assessed on a case-by-case basis and often depends on the practical arrangements in place. Transfers taking place **by land** (particularly between neighbouring States) have a higher chance of success than those that should take place **by air** (due to reduced or suspended air traffic).

As previously mentioned, the developments in the COVID-19 crisis point to **some reoccurring issues in relation to the functioning of commercial flights**.

### *Postponement of the actual surrender*

Where surrender is not possible in the individual case due to the measures taken as reaction to the COVID-19 crisis, the executing judicial authorities normally **decide to postpone the surrender pursuant to Article 23 EAW FD**. This legal framework is generally considered sufficient to face the current situation.

As regards the specific reason justifying the postponement of surrender, there is no common approach among the Member States. While many States invoked the circumstances of *force majeure* under Article 23(3) EAW FD, a few others, bearing in mind that the duration of this pandemic is unpredictable, preferred to rely on the serious humanitarian reasons set forth by Article 23(4) EAW FD. Finally, there are several States that applied **either Article 23(3) or Article 23(4) EAW FD, depending on the specific circumstances of the individual case**. In both scenarios, a consultation between the executing and issuing authorities was necessary to agree on a new surrender date. However, under Article 23(3) EAW FD it is necessary for both judicial authorities to immediately contact each other, consult each other on a regular basis, and reach an agreement on a concrete new surrender date. This would have to be linked to the end of the state of emergency or confinement measures adopted by the Member States and cancellation of flights, which so far have been regularly extended.

It is noteworthy that the compilation -as a living document- provides updated information on the extension and conclusion of the state of emergency or any confinement measures deadlines and therefore contains relevant information to set new surrender dates in accordance with Article 23 (3) EAW FD. In contrast, under Article 23(4) EAW FD the authorities involved are initially exonerated from such obligation as it is provided that surrender shall take place as soon as the grounds justifying the postponement have ceased to exist and, therefore, the executing judicial authority shall eventually- and immediately inform the issuing judicial authority and -then - agree on a new surrender date. Furthermore, taking into consideration the indefinite nature of this situation, judicial authorities were prompted to explore the possibilities of having recourse to other measures alternative to surrender (e.g. issuing an European Investigation Order to hear the requested person via videoconference during the trial phase, with their consent, in order to avoid an adjournment of the trial, transfer of criminal proceedings or taking over the enforcement of a custodial sentence).

In the event that surrender was temporarily postponed, the executing judicial authorities were called to review the prolongation of the requested person's arrest until the actual surrender becomes possible. Several States have reported cases where, based on the circumstances of the specific case, prolonging detention would be in conflict with the principle of proportionality and the executing judicial authorities have accordingly **released the requested person** and adopted **measures to prevent the person from absconding** pursuant to Article 12 EAW FD (e.g. obligation to report to the police, travel ban, probation orders, bail, house arrest). There has also been cases where the prolonging of detention awaiting the feasibility of surrender led to the withdrawal of the EAW and the release of the requested person. Again, the **importance of consultations with the issuing authorities** is underlined in order to refresh the reasons for maintaining the arrest or not.

Due to the current COVID-19 restrictions surrenders are carried out accordingly, e.g. in some cases postponements are necessary due to the lack of some direct flights.

### *Transits*

Only a few States suspended all transits. In the majority of States, transits remained –in principle- possible, but subject to a case-by-case assessment. In practice, the main difficulties were caused by the flight and lockdown restrictions.

### *Precautionary measures*

The majority of the States have adopted precautionary measures to safeguard the health of the surrendered person and escorting officers where surrender actually takes place.

Some States request a negative COVID-19 test in relation to the **surrendered person**, while others solely request a general medical certificate. A few States do not require any health certificate, however, the person should not have any symptoms of COVID-19. Moreover, additional precautionary measures might be taken on a case-by-case basis. In many States, the surrendered person has to wear protective equipment (mask, gloves) during the surrender and will be placed in quarantine upon arrival.

Most States apply general rules in relation to the **escorting police officers** and the protections that are obligatory for the general population (e.g. wearing a mask, gloves, social distancing, disinfection, hotel rules). Only very few States explicitly mention that they apply quarantine rules to police officers.

**In view of recent developments, revisions of the precautionary measures in place are foreseeable in all States.**

## **2. Extradition**

Also in relation to extradition requests from third States, the measures adopted at national level in relation to COVID-19 have an impact on the **execution of the actual surrenders, which in several States are being postponed to the end of the crisis**. Currently, the main obstacle States are facing are the limitations of flights with some third States and the closure of borders. This does not pose major problems in the context of extradition.

## **3. European investigation orders and mutual legal assistance requests**

The measures as initially imposed in the context of the COVID-19 crisis had an impact on the issuing, but especially on the execution of other judicial cooperation instruments. However, at one point the resumption of judicial activities has brought the situation back to normal, also in relation to the issuing and execution of EIOs. **Alternative solutions were identified during the early crisis for the execution of EIOs**, such as hearings via video or telephone conferences. Those solutions are still considered preferable, also in the light of the recently reinstated restrictions in response to the recrudescence of the COVID-19 situation.

Some States indicate that **the issuing of European Investigation Orders (EIOs) or requests for mutual legal assistance (MLA)** continued as usual. Others inform that the issuing of these instruments has decreased and that prioritisation is also applied here. In some of these States, EIOs are being issued and translated, but the transmission by regular postal service to the executing State has been affected, suspended or postponed.

In most States, **the execution of EIOs and MLA requests** was initially restricted to urgent cases and/or postponed, in particular in those States where the adopted state of emergency implied the suspension of procedural time limits and hearings. Where this prioritisation applied, the main criteria used besides urgency were, for instance, the seriousness of the offence, whether the suspect is under pre-trial arrest, the risk that evidence will be lost and the stage of the proceedings in which the evidence was to be gathered. A **case-by-case evaluation** applied. Furthermore, even in the States that did not apply a prioritisation, delays in the execution could (and may still) occur if general confinement measures were in place, limiting judicial activity (e.g. remote working of judges and prosecutors). In this respect, in several States **measures requiring physical contact (e.g. house searches, hearings in person, etcetera) were postponed or, if feasible, adequate alternatives put in place** (e.g. hearings taking place via video- or telephone conferences). While in some States it was always possible to request the appearance of a person before the competent authorities, in others videoconference was the preferable way to hear a person, and in some States even the only way possible. In a few other States, house searches were executed as normal. Furthermore, in some States, participation by the issuing authorities was either not permitted or allowed only where necessary after an assessment on a case-by-case basis. In general terms, non-urgent investigative measures were in principle put on hold.

As to the means of transmission of EIOs and MLA requests, **the majority of the States recommend electronic transmission of requests (i.e. email)** as the most effective means in the current situation. This is still the case, especially with regard to urgent requests. Most States encourage addressing the requests directly to the competent executing authorities, while others recommend sending the request to a centralised email address as the executing authority may not be directly reachable in the current circumstances. **Eurojust and the EJM can facilitate transmission of EIOs/MLA requests, exchange of information and identification of the competent executing authority.**

#### **4. Transfer of sentenced persons**

**Most States initially suspended the transfer of sentenced persons, however later in several States these transfers became possible again.** In those States where the transfer of sentenced persons is possible, an assessment is done on a case-by-case basis, and in some States urgent cases are prioritised. In such cases, it is also underlined that **the time limit of 30 days for the execution of the transfer under Article 15(1) FD 2008/909/JHA is not likely to be met.** Practical issues encountered by national authorities when carrying out transfer are mainly related to the closure of internal EU borders and the cancellation of flights, as well as situations that require physical contact and medical screening. Sanitary rules are to be observed for the interest of the sentenced persons and the escorting officers. Persons transferred to other States are in principle placed in quarantine. Some States specified that decisions on the recognition of judgments continue to be issued.

Some States reported that transfers of sentenced persons to other Member States are possible, with the only practical issue being the cancellation of some flights. While a few others mentioned that transfers were suspended due to COVID-19 safety measures and restrictions.

#### **5. Freezing and confiscation orders**

While in many States the situation is unchanged with respect to freezing and confiscation orders, **several other States are prioritising the issuing of certificates for the mutual recognition of freezing and confiscation orders only in urgent cases.** This is very often not the result of an *ad hoc* policy, but rather an indirect effect of the general limitations on judicial activities. However, this prioritisation **does not usually affect freezing orders as they are generally regarded as urgent** due to the risk of dissipation of assets.

#### **6. Joint Investigation Teams**

Joint Investigation Teams (JITs) continue to operate regularly in most States, with the main difference that **travel and physical meetings between JITs' members are not regularly taking place or are taking place to a very limited extent depending on the restrictions imposed by to National Authorities.**

## 7. General issues

Another measure having a significant impact also in the field of judicial cooperation in criminal matters was the **remote working**, as most judges and prosecutors were teleworking (from home), and therefore the activities of the national courts and public prosecutors' offices were limited. Only judges and prosecutors on duty 24/7 could deal with very urgent requests. A case-by-case approach showed to be the predominant one under the new circumstances. **Even though the recent worldwide increase in COVID-19 cases has led to the reintroduction of restrictions in certain States, these do not necessarily have a direct or significant impact on judicial cooperation in criminal matters.**

In most Member States, SIRENE Bureaux worked at limited capacity during the early period of the pandemic, although no serious problems arose in the exchange of information. At present in almost all Member States SIRENE Bureaux works to their full operational capacity.

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