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NOTE

From: Presidency
To: Delegations
Subject: The way forward in the field of mutual recognition

The follow-up to the Council Conclusions adopted in December 2018 on '*promoting mutual recognition by enhancing mutual trust*' is one of the priorities of the Presidency. In this context, and taking into account the outcome of the discussions on this matter at the informal meeting of the Justice and Home Affairs Ministers in Bucharest on 7 and 8 February 2019, the Presidency prepared a discussion paper on '*the way forward in the field of mutual recognition of judicial decisions in criminal matters, responding to the necessity of avoiding impunity and observing procedural safeguards*'. Please find this paper attached.

Member States are kindly invited to submit replies to the questions set out in this paper by **Thursday 7 March cob**, to the Presidency (Florin-Răzvan Radu, razvan.radu@rpro.eu) and to the General Secretariat (steven.cras@consilium.europa.eu).

The replies will subsequently be distributed on 8 or 11 March, and discussed at the COPEN meeting that is scheduled to take place on Monday 18 March.

Discussion Paper**on the way forward in the field of mutual recognition of judicial decisions in criminal matters,
responding to the necessity of avoiding impunity and observing procedural safeguards****Context**

At the informal meeting of the Justice and Home Affairs Ministers in Bucharest, which took place on 7 and 8 February 2019, Ministers discussed several issues regarding the way forward in the field of mutual recognition of judicial decisions in criminal matters. As announced, subsequently to discussions at that meeting the Presidency intends discussing the issues concerned at other (technical and political) levels. On the basis of this input, the Presidency aims to present a report to the JHA Council in June 2019, so as to assist future Presidencies to carry forward the work on this important matter.

This paper fits in the context thus described, as it seeks to provide a basis for discussion in the Working Party on a number of aspects identified by the Presidency that could constitute possible solutions, either of a legislative or non-legislative nature, with a view to overcoming the current obstacles in the application of mutual recognition instruments.

Such obstacles could lead to a possible undermining of the principle of mutual recognition as a result of decreasing mutual trust. The Presidency recognises the various causes of this situation and that there is a need to address these in order to foster and increase mutual trust between the judicial authorities of the EU Member States. Therefore, one of the key priorities of the Romanian Presidency is to promote a process of reflection on how best to promote the mutual recognition of judicial decisions in criminal matters, that would, at the same time, take into account the need to avoid impunity and observe procedural safeguards¹.

¹ See in this context the six Directives on procedural rights (Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/343, (EU) 2016/800, (EU) 2016/1919) which establish common minimum rules for suspects and accused persons. Their timely and correct implementation will contribute to strengthening the trust of Member States in each other's criminal justice systems.

This discussion paper takes into account and builds further on the Council Conclusions of December 2018 on ‘Promoting mutual recognition by enhancing mutual trust’ (OJ C 449, 13.12.2018, p. 6).

Discussion points / Questions

I. Problems encountered in the application of the criteria set out in the Aranyosi judgment or in the application of grounds for refusal

In 2016 the Court of Justice of the European Union (CJEU) issued the *Aranyosi* judgment². The interpretation of this judgment has also been extended to the Framework Decision 2008/909/JHA³. In fact, in application of this judgment, the authorities of a number of Member States have requested information about prison conditions in other Member States when deciding whether to give their consent to the transfer of a sentenced person to his or her country of nationality/residence.

Subsequently to this judgment, and in relation to the issue of prison conditions, several other questions have since been brought to the attention of the CJEU. In some cases the Court has already rendered its judgment (see i.a. the judgment in case C-220/18 PPU, *ML*), while in others the CJEU decision is pending (C-128/18, *Dorobanțu*).

These judgments have added new criteria that need to be taken into account by the executing judicial authorities when deciding on European arrest warrants (EAWs). To date, no clear answer has been provided as to how impunity can be avoided in a case where an executing State has refused to execute an EAW. The use of Framework Decision 2008/909/JHA, as an alternate solution in order to request taking over the execution of the sentence, has appeared to be limited in practice, since the conditions for the application of this instrument are normally not met.

In this light, the Presidency would like to ask the following questions to the delegations:

² Joint Cases C-404/15 (*Aranyosi*) and C-659/15 PPU (*Căldăraru*).

³ Opinion of Advocate General Bot in the *Aranyosi* and *Căldăraru* cases, par. 128.

1. Which are the recurrent problems in the application of the *Aranyosi* judgment? How was this judgment interpreted by your authorities? If your authorities issue requests for supplementary information as regards prison conditions to the authorities of other Member States, are such requests issued exceptionally, using a strict interpretation of the *Aranyosi* judgment, or on a regular basis? And are such requests tailored in the light of the national context of the executing State, or of the own issuing State? Do you believe a common working methodology is needed in these cases?
2. Did your authorities encounter issues in the application of fundamental rights as a ground for refusal (see Directive 2014/41/EU on the European investigation order in criminal matters)? How often have your authorities invoked such ground for reason for refusal so far?
3. Did you encounter issues in the application of other grounds for refusal, e.g. grounds for refusal based on the absence of double criminality?

II. Training and guidance on mutual recognition instruments

1. Do you think the current training programmes for the members of the judiciary in your country as well as the EJTJN programmes offer courses that are sufficiently comprehensive? Do these courses comprise adequate material and documentation giving judges and prosecutors access to the most recent information on the current application of mutual recognition instruments? How often are the training materials/courses updated at national level? What improvements, if any, are necessary in your view? Do you have suggestions regarding how to make more accessible and further improve the quality of the existing offer of courses and training materials?
2. Do you find the existing handbooks (such as the one on issuing and executing an EAW⁴)? useful in that they provide information on the practical application of the available instruments? How could such handbooks be further improved? Do you have suggestions regarding further ways of facilitating the understanding and correct use of these instruments by legal practitioners?

⁴ A similar handbook on the Framework Decision 2008/909/JHA will be launched by the Commission during the Romanian Presidency of the Council.

III. Identification of gaps in the application of mutual recognition instruments and possible solutions to fill these gaps

1. In your opinion, what are the reasons for the less frequent application of some of the mutual recognition instruments, such as Framework Decision 2008/947/JHA (Probation) and Framework Decision 2009/829/JHA (Supervision)? How could this situation be addressed?
2. What could be done to ensure that the risk of impunity is reduced to a minimum in cases of refusals to execute an EAW? Do you see a need for a legislative proposal on the transfer of criminal proceedings?
3. Do you see a need for further legislative proposals in the area of procedural rights in criminal proceedings?

IV. Enhancing the institutional framework which allows a proper functioning of judicial cooperation in criminal matters at EU level and use this institutional framework at its full capacity

1. How could the results from the EJM meetings be better used by the Council (through COPEN perhaps?) and the Commission? Do you have any suggestions to further improve the website of the EJM? What changes, if any, should be made to improve the awareness among the Member States' authorities of the existence of the EJM and its website?
2. In what ways could Eurojust further contribute to the improved application of mutual recognition instruments, taking into account the vast caseload it has and the dissemination of information through its annual reports?
3. What role should be played in the future by the Working Party on Cooperation in Criminal Matters (COPEN) in discussing the actual application of mutual recognition instruments? Should such evaluations be included regularly on the agenda of the COPEN general meetings?