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NOTE

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| From: | Presidency |
| To: | Delegations |
| Subject: | 9th round of mutual evaluations - Scope of the evaluation and contributions to the questionnaire |

The eighth round of mutual evaluations, dedicated to the practical implementation and operation of European policies on the prevention and combating environmental crime, is close to being finalised. Since it started in September 2017, 25 Member States have been evaluated, and so far 16 reports have been adopted. The last evaluation visits are foreseen to take place in the end of February 2019, which means that the remaining reports, as well as final report of the eight round of mutual evaluations could be adopted by September 2019. Based on the above timeline, the first evaluation visits of the ninth round of mutual evaluations could take place in the second semester of 2019.

According to Article 2 of Joint Action 97/827/JHA¹, adopted by the Council on 5 December 1997, the Presidency shall propose to delegations for approval a "*specific subject of the evaluation as well as the order in which Member States are to be evaluated*".

¹ Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (OJ L 344, 15.12.1997, p. 7).

Following discussions at CATS and at ministerial level, including at the JHA Council on 11-12 October 2018, which highlighted the importance of improving mutual recognition of judicial decisions and judgements with a view to enhancing mutual trust within the Area of Freedom, Security and Justice, the Austrian Presidency proposed to focus the next round of mutual evaluations on certain aspects of mutual recognition of judgments and judicial decisions.

This proposal was broadly supported by delegations at the CATS meeting on 21 November 2018 and subsequently endorsed on 6-7 December 2018 by the JHA Council in its conclusions on mutual recognition in criminal matters².

Following the above decision, the Presidency continued the preparatory work concerning the 9th round of mutual evaluations, in order to define more precisely the scope thereof. To this end, a Friends of Presidency COPEN meeting was held on 25 January 2019 to discuss, on the basis of doc. 5296/19, which mutual recognition instruments and which specific aspects of these instruments should be evaluated, following which written comments were received from some delegations.

Discussions continued at the CATS meeting on 12 February 2019, on the basis of doc. 5707/19. Though different views were expressed by delegations, a majority supported that the 9th round of mutual evaluations should cover certain aspects of the practical application of the following mutual recognition instruments:

- Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States ('EAW').
- Framework Decision 2008/909/JHA 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 ('Custodial sentences').

² OJ C 449, , 13.12.2018, p. 6.

- Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions ('probation and alternative measures').
- Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle on mutual recognition to decisions on supervision measures as an alternative to provisional detention ('ESO').³

However, several delegations expressed the view that the scope of the 9th round of mutual evaluations should be narrower than in the Presidency's proposal, some of them underlining also that up to now Framework Decision 2008/947/JHA and Framework Decision 2009/829/JHA have not been sufficiently implemented.

In the light of the above, the 9th round of mutual evaluations will focus on the following issues:

1) As regards FD 2002/584/JHA on the EAW:

a) Practical challenges encountered by Member States' judicial authorities in relation to the recent case-law of the Court of Justice of the EU (CJEU) in the field of mutual recognition; in particular, the evaluation could assess the procedure to follow in case of a risk of infringement of fundamental rights, because of detention conditions ("Aranyosi"⁴ and "Căldăraru"⁵ joined cases and ML case⁶), including as regards supplementary information and procedures in order to respond to questions related to prison conditions.

b) Certain issues identified in the 4th mutual evaluation round⁷ that still remain problematic and need further assessment, such as:

- Proportionality (point 3.9 of the 4th round report), in relation to the use of the EAW as the most appropriate instrument, which has also been explicitly confirmed by the Ministers during the discussion on mutual recognition at the JHA Council on 11-12 October 2018 to be an important outstanding issue in the application of the EAW;

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⁴ Case C-404/15

⁵ Case C-659/15

⁶ Case C-220/18

⁷ doc.8302/4/09 and doc. 15815/1/11

- Role of the central authorities (Article 7 - point 3.1 of the 4th Round Report) and direct contacts between the competent judicial authorities (Article 9 - point 3.2 of the 4th Round Report), including issues arising in the post Aranyosi/Căldăraru context;
 - Deficits of information by the executing authority to the issuing authority (Article 22 - point 3.15 of the 4th Round Report) and the requirement of providing additional information by the issuing authority to the executing authority (Article 15.2 - point 3.16 of the 4th Round Report).
- c) Further challenges that have arisen since the 4th mutual evaluation round, such as:
- New obstacles identified with regard to grounds for refusal, e.g. in relation to judgements "in absentia" (Article 4a).

2) As regards FD 2008/909/JHA on Custodial sentences, since it is the first time this instrument would be evaluated, the evaluation could be more extensive and consequently focus on the following issues:

- Nature of measures involving deprivation of liberty-differences in legal systems;
- Issues linked to the assessment of facilitating social rehabilitation (Article 4(4));
- Opinion and notification of the sentenced person concerned (Article 6);
- Adaptation of the sentence (Article 8(2));
- Grounds for non-recognition and non-enforcement (Article 9);
- Minor custodial sentences summing up to a custodial sentence of at least 6 months (Article 9.1 (h));
- Judgements in absentia (Article 9.1 (i));
- Partial recognition and enforcement (Article 10);
- Time limits for recognition and enforcement (Article 12);
- Law governing enforcement-grounds for early or conditional release (Article 17);
- Imprisonment in lieu of a fine-differences in Member States' legal systems and practices;
- Requirement of a written judgment-differences in legal systems;
- Requirement of translation of the judgment (Article 23(2) and (3)).

3) Referring to FD 2008/947 on probation and alternative measures and FD 2009/829 on ESO, the aim of the evaluation will be to enhance the efficiency in the application and the awareness of these instruments among the practitioners. Since there is a perception that these instruments are less used in practice than other mutual recognition instruments, the evaluation will be of a rather general nature and try to establish the reasons that have led to a scarce application of these two Framework Decisions.

4) The 9th mutual evaluation round will also examine the legal and operational links between FD 2002/584/JHA on EAW and FD 2008/909/JHA on custodial sentences, in particular as regards the possibility, under Article 4(6) and Article 5(3) FD 2002/584/JHA read in conjunction with Article 25 of FD 2008/909/JHA, for the executing Member State to refuse a surrender of its nationals or residents, if the latter undertakes to enforce the prison sentence in accordance with FD 2008/909/JHA (e.g. Poplawski case⁸).

⁸ Case C- 579/15

5) The 9th round of mutual evaluations will also examine the very important cross-cutting issues related to the training component. In particular, the evaluation should assess the in-service ("continuous") training provided by the national judicial schools on each of the four legal instruments, including the number of judicial practitioners who benefited from such training. It could also be assessed to what extent practitioners make use of trainings opportunities at EU level.

A round of mutual evaluations dedicated to such topics, based on the peer review approach, would provide a real added value by offering the opportunity, with the on-spot visits, to consider not only the legal issues but especially relevant practical and operational aspects linked to the implementation of these instruments by practitioners in the context of criminal proceedings. This would allow to identify both shortcomings and areas for improvement, as well as best practices to be shared among the Member States, thus contributing to ensuring a more efficient and coherent application of the principle of mutual recognition at all stages of criminal proceedings across the Union.

More generally, promoting the coherent and effective implementation of this package of legal instruments at its full potential could significantly contribute to enhancing mutual trust among the judicial authorities of the Member States and to a better functioning of cross border judicial cooperation in criminal matters within the Area of Freedom, Security and Justice.

Taking into account the scope of the 9th round of mutual evaluations as defined above, the Presidency intends to continue to work at technical level on the questionnaire and on the order of the visits to the Member States, with a view to adopting them at the CATS meeting on 13 May 2019.

For this purpose, delegations are kindly invited to submit written suggestions as regards the questions to be included in the questionnaire for the 9th round of mutual evaluations to the Presidency (razvan.radu@rpro.eu, rsimion@just.ro and dana.roman@just.ro) and to the General Secretariat of the Council (jai.mutual.evaluation@consilium.europa.eu) **by 28 February 2019.**