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NOTE

from:	Incoming Belgian Presidency
to:	Working Party on Cooperation in Criminal Matters (COPEN)
Subject:	Follow-up of the Mutual recognition instruments

Delegations will find attached a discussion paper from the incoming Presidency addressing the issue of implementation and practical application of instruments implementing the principle of mutual recognition (MR) of judicial decisions in criminal matters.

The discussion paper aims to establish a methodology consisting of a set of practical measures to be taken at European Union level with a view to facilitating and improving the implementation of these instruments by ensuring exchange of information on their follow-up in the Member States and by providing judicial authorities with relevant information for their day-to-day application.

Delegations are invited to discuss and agree on the setting up of such a methodology, as well as on each specific practical measure proposed.

A number of instruments have been adopted in recent years on the basis of the principle of mutual recognition. In order to ensure concrete changes in the judicial cooperation practice, this huge legislative work needs legislative and effective implementation in the member States. The Stockholm Programme expressly points to the need for increased attention in the coming years to the full and effective implementation, enforcement and evaluation of existing instruments. Legislative transposition should be ensured using existing institutional tools wherever necessary to their fullest extent.

Although the issue of implementation affects the whole field of criminal Justice, the problems raised in relation to MR have specific consequences. Due to their objects, these instruments have a more direct impact on co-operation between national authorities than most other instruments. Failure to implement them creates serious difficulties for the daily work of magistrates and may even result in a legal *vacuum* creating situations where it becomes impossible to co-operate. Data on the implementation of existing MR instruments show that the situation is clearly problematic and that improvements in this area are necessary.

It is important to reflect not only on how to monitor implementation but also on how to accompany and make it easier for national legislators to draft national legislation implementing MR instruments.

Apart from the implementation of MR instruments in national legislation, practical measures also need to be taken at EU level to support and facilitate the work of practitioners, especially with regard to the difficulty of finding accurate and up to date information about implementation in other Member States. The Stockholm Programme contains several proposals to that end, including drawing up handbooks and national fact sheets.

Therefore, a methodology is proposed to ensure systematic exchange of information on the follow-up of implementation of MR instruments and on practical measures to facilitate the application of these instruments.

In these discussions, it is important to keep in mind that the Lisbon Treaty brings important changes in this area. Apart from the responsibility of Member States to fully implement legal instruments that have been adopted, the Commission will be responsible for overseeing the proper implementation and application of new MR instruments (plus, as from 1 December 2014, existing Framework Decisions) and will have more powers to do so.

1. Shortcomings of the current situation

The state of play regarding implementation of the Framework Decision on the European Arrest Warrant on 1 January 2004, by when it should have been fully applicable, was not satisfying as only 8 of the then 15 Member States had managed to meet the deadline. The remaining 7 Member States took more months before implementing it. Since then, all 27 Member States have implemented the EAW which now, according to the fourth round of mutual evaluation, is working satisfactorily.

However the situation for the other instruments that are already applicable is more alarming. According to information provided by the General Secretariat of the Council:

- Only 23 Member States have fully implemented the Framework Decision 2003/577/JHA on the Freezing of Assets almost 5 years after the deadline (2 August 2005);
- The application of the Framework Decision on the mutual recognition of decisions imposing financial penalties should have begun on 22 March 2007: only 2 Member States had notified at that time that they had implemented the Framework Decision. Its implementation has now been notified by 15 other Member States;
- With regard to the Framework Decision 2006/783/JHA on the application of mutual recognition to confiscation order (date of implementation: 24 November 2008), only 11 Member States have implemented it so far.

Further on quite a number of instruments have been adopted on the basis of the mutual recognition principle in the recent years, and it is more than likely that the situation described above will recur¹:

- Framework Decision 2008/947/JHA of 27 November 2008 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 (date of implementation : 6 December 2011);
- 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 (date of implementation : 5 December 2011)
- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (date of implementation : 19 January 2011) - note however that a recent proposal by 7 Member States aims at replacing that Framework Decision.
- Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (date of implementation: 28 March 2011)²
- Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (date of implementation: 1 December 2012)

¹ This list does not take into account the Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, nor the Framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, which are not MR instruments as such.

² The implementation of the Framework Decision on judgments rendered in absentia will only imply limited efforts at EU level. However, an adaptation of the existing certificates / forms will at least be necessary. See point 3, d).

2. Accompanying legislative implementation at national level

Many problems that are likely to occur in the application of MR instruments could be avoided during this phase of implementation through proper exchanges of information between the Member States. Common difficulties could also be examined then and later through discussions, thereby making it easier for everyone to find suitable and compatible solutions.

The implementation of the FD on the EAW was monitored intensively during and after the implementation period. The working group on cooperation in criminal matters has since then met regularly (usually twice a year) in a special format of EAW experts. This group has provided a forum for discussion and useful exchange of information. Efforts have been much more sporadic regarding the other instruments.

More emphasis has now been placed on the implementation phase by the Commission. A number of regional seminars have been organised recently by the Commission, as well as experts' meetings with a view to supporting the Member States. The Commission has found that, implementation of secondary legislation can greatly benefit from continued dialogue between national administrations and the institutions as well as from input from external experts such as academics and practitioners. This dialogue means that problems stemming from implementation can be forestalled and avoids divergent interpretations between Member States, which is detrimental to the uniform application of EU law throughout the EU.

In this context, the Presidency intends to organize a seminar on 8-9 July 2010 in order to support in particular the implementation of one of the MR instruments – the Framework Decision of 27 October 2008 regarding the recognition and supervision of suspended sentences, alternative sanctions, and conditional sentences (hereinafter the “probation” Framework Decision). This seminar is based on the assumption that successful implementation relies on a clear understanding of the discrepancies between national systems, meaning that it is essential to improve knowledge of probation systems and measures within each Member State. The results of this seminar will be submitted for information and possible discussion to the relevant working parties of the Council.

Together, the Council and the Commission should succeed in the aim of maintaining pressure on the Member States to implement MR instruments ‘in time’, improving mutual knowledge of national systems with regard to the specific area of cooperation covered, and identifying any difficulties faced in the transposition process. Once the legal implementation process is finalized, discussion would also be useful on the practical and legal difficulties encountered in the practical day-to-day application of the instruments. As shown by the experience of the COPEN working party in EAW expert format, such discussion permits exchanges of information on case-law and best practices and can eventually give rise to common practical solutions.

The Commission is encouraged to pursue its efforts by providing guidance and assistance to the Member States in their implementation work. Future Presidencies are also invited to provide a forum for discussions for Member States willing to raise specific questions related to the implementation, practical application or evaluation of the instruments *in formal as well as in informal meetings*.

3. The need to improve measures to be taken at EU level to facilitate the practical application of MR instruments

A more proactive and systematic approach is also necessary with regard to practical measures to be taken at EU level to facilitate the application of MR instruments, once they have been transposed into national law.

The following five measures at least should be taken for each MR instrument: (a) making available information on official notifications, (b) preparing and making available practical information on national systems, (c) developing the Atlas, (d) developing and making available the certificate/warrant in electronic format and in all languages, and (e) developing a handbook for each MR instrument, like the one on the Handbook for the EAW.

a) Information on official notifications

Practitioners find the website of the Council of Europe useful because it provides daily, up-to-date information on the entry into force of European conventions in each contracting State as well as any declarations. They have repeatedly complained of the fact that it is much more difficult for practitioners to find the same level of information regarding the instruments adopted by the European Union.

One way to obtain exhaustive information is to search in the Council register for all documents related to the MR instrument concerned. This is a complex exercise for people not used to this tool and it is very cumbersome.

The General Secretariat of the Council produces on a regular basis very useful tables on the implementation of each MR instrument. But practitioners cannot be sure that the table is up to date and these tables are also difficult to find in the register. It should be noted that the sending of official notifications to the Council by the Member States is not always systematic and particular attention should be paid to this in the future by each Member State. Permanent Representations should exercise special care in this regard.

Information is also available on the “Justice and Home Affairs” section of the website of the Council (<http://www.consilium.europa.eu/showPage.aspx?id=475&lang=EN&mode=g>). However, this section is difficult to find and is not kept up to date, although efforts are currently made to remedy the situation.

While the General Secretariat of the Council was initially designated to receive the official notification from the Member States, the Commission will now, as a consequence of the entry into force of the Lisbon Treaty, take over this responsibility for future instruments adopted in the field of criminal matters.

However, with regard to the specific aim of disseminating information to the competent authorities, the Presidency is of the opinion that the natural host for this information is the EJM website (www.ejm-crimjust.europa.eu). This website is one of the biggest achievements of the EJM. The information available is practical, useful and essential for the day to day operation of the national (local) judicial authorities. Though the information on the implementation of MR instruments should be produced in the Council / Commission, the EJM is better placed to present this information in a way which is the most suited to the needs of practitioners. The EJM website already contains the text of the instruments as well as the Atlas on mutual legal assistance and the EAW Atlas.

A solution could therefore be that all notifications transmitted by MS to the GSC (or the Commission for the future instrument) regarding the implementation of MR instruments are forwarded by the GSC (or the Commission) to the EJM Secretariat which would have the duty to ensure immediate upload on the website.

The information should also be presented in a clear way, and be easy to find for people who are not necessarily used to European Union instruments. For instance, the state of play of the implementation should be presented in the form of tables.

As the EJM is currently working on a revision of its website, it seems urgent, if the proposal is supported by delegations, to enter into discussions with the EJM Secretariat.

In addition the relevant Council Working Parties should be regularly informed of these states of play, with a view to pointing out where necessary the need to put pressure on the implementation process.

b) Practical information on the national systems

For the EAW, through the so-called “fiches françaises”, each MS has provided the others with very useful practical information on how the cooperation will apply in practice, as regards both issuing and executing. According to the Stockholm Programme, similar fact-sheets should be drafted, filled in and made available for all MR instruments.

A model national fact-sheet should be prepared in the Working Party and MS should send the fiches they have filled in to the GSC (or the Commission for future instruments). However, for the same reasons as those detailed above, the fact-sheets should be made available on the EJM website.

c) Atlas

The principle of direct contacts between competent authorities exists in all MR instruments. This means that the issuing authority needs to be able to identify the authority locally competent to receive the decision to be executed. The EJM has developed the Atlas on mutual legal assistance for that purpose. With regard to MR, it is however only available for the FD on the EAW. An Atlas for the FD on freezing orders is currently being developed.

A more proactive approach should be followed so that, for each instrument, at the end of the implementation period, Atlas has been developed and is ready to receive data from each MS on the competent receiving authorities.

d) Certificate/warrant in electronic version:

One of the advantages of MR instruments in comparison to legal assistance is the use of a certificate / form which provides standardized sections that facilitate both the work of the translators and the readability of the document.

These certificates / forms should be made available to judicial authorities of the Member States in the same way on the EJM Website in a usable electronic format and in all official languages of the European Union. Existing certificates / forms should also be adapted in order to take into account the framework decision on judgments rendered in absentia.¹ This framework decision will entail a series of modifications in the existing certificates / forms. These modifications should be made by the General Secretariat of the Council, and the consolidated versions should be made available on the EJM Website by 28th March, which is the legal date for the implementation of the framework decision.

¹ See also document 9494/10 COPEN 119 CODEC 400.

e) Development of Handbooks

In order to facilitate the application of the EAW, a Handbook has been produced which has proved to be a useful tool in assisting practitioners to issue EAW's.

As the Stockholm Programme provides, there should be Handbooks or national fact sheets for all mutual recognition instruments that have been adopted so far. The Commission is invited to develop such Handbooks together with experts from the Member States. Work should begin with those MR instruments that have already entered into force and the aim should, as provided for in the Stockholm Programme, be to develop a Handbook for all MR instruments that have been adopted over a five year period.

4. Proposal for a methodology/procedure

If delegations agree on the measures to be taken and described above, there is much to be done. For example, three Framework Decisions will become applicable before the end of 2011 which leaves little time.

There seems therefore to be a need for a standard methodology or procedure which would be applied to all MR instruments. It would consist of the following steps:

1. All notifications transmitted by MS to the General Secretariat¹ regarding implementation of MR instruments are forwarded by the General Secretariat to the EJM Secretariat which would have to ensure immediate upload on the EJM website. A specific transmission procedure should be established by the GSC and the Commission to this end.
2. A document will be circulated regularly (every 6 months) by the General Secretariat, and in the future the Commission, indicating the state of play of each instrument. The state of play will take the form of the tables proposed in the Annex to this document and will also be available on the EJM website.

¹ It is understood that for future instrument adopted in the field of mutual recognition, the Commission will take over the responsibilities of the General Secretariat above-mentioned.

3. The state of play will be discussed once during each Presidency at CATS level. The Council will, when necessary and on the basis of a proposal from the Presidency, adopts conclusions on this state of play.
4. The discussion on the state of play regarding existing MR instruments will not only deal with the implementation by the Member States but also with measures which have to be taken at EU level. These latter measures are :
 - Preparing a standard fact-sheet to be filled in by the Member States and containing the practical information on their national system necessary to enable the application of the instrument concerned.
 - Making available, in a clear and user-friendly way, on the website of the European judicial network in criminal matters:
 - § the updated state of play of the implementation (on the basis of information transmitted by MS and forwarded by the GSC, and later the Commission)
 - § the national fact-sheets which are available (on the basis of information transmitted by MS and forwarded by the GSC, and later the Commission)
 - § the certificate/warrant in electronic format in all linguistic versions. These certificates/warrants must be updated by the GSC, and later the Commission (e.g. taking into account the Framework Decision on judgment in absentia) and directly usable.
 - § The Atlas

With regard to accompanying measures to be taken during the implementation period, the work would be done on a case by case basis (see section 2 of this paper). A one-day discussion at least, in an appropriate forum, should be devoted to each instrument. After the implementation period, further discussions on practical or legal difficulties may also be carried on.

A. State of play regarding the progress of the implementation of existing Framework

Decisions

The state of play will regularly circulate in the Council. The same tables will be copied for each MR instrument.

1. (Title of the MR instrument)

Applicable since:

a) Measures to be taken at EU level

Standard fiche for the "practical information" to be submitted ¹ :	Yes (+ref) / No (+ expected date)
Standard electronic format for the certificate / warrant ² :	Yes (+ref) / No (+ expected date)
Atlas to identify the authority competent to receive the certificate / warrant ³ :	Yes (+ref) / No (+ expected date)
Others	

¹ The objective is to prepare, for every of these Framework Decisions, a standard document to be filled in by the Member States and containing practical information on how the instruments is implemented (authority competent to issue the certificate/warrant, authority competent to execute it, languages accepted, ...). This has been done for the Framework Decision on the European Arrest Warrant (the so-called "fiches françaises") and has proved very useful in practice.

² As in the case of the Framework Decision on the European Arrest Warrant, a pdf form should be prepared for every certificate or warrant and in all EU languages in order to facilitate the use of the certificate/warrant and the translation.

³ An Atlas may be necessary to allow the issuing authority to identify the authority competent to receive the warrant/certificate. Such Atlas is available for mutual legal assistance and for the European Arrest Warrant on the EJM website. It should be extended where appropriate to the other Framework Decisions.

b) National implementation

	Implementation is finalised - Notifications		The implementation is not finalised yet	
	Implementing measures (dates)	Practical information ¹	State of play ²	Expected date of impl.
Austria				
Belgium				
Bulgaria				
Cyprus				
Czech Rep,				
Denmark				
Estonia				
Finland				
France				

¹ The notification of practical information depends on the existence of a standard format for this "practical information", such as the "fiche française" in the case of the EAW (see footnote above).

² 0 = no information
1 = the legislation has not yet been submitted to the Parliament
2 = the legislation is currently discussed in Parliament

Germany				
Greece				
Hungary				
Ireland				
Italy				
Latvia				
Lithuania				
Luxembourg				
Malta				
The Netherlands				
Poland				
Portugal				
Romania				
Slovakia				
Slovenia				
Spain				
Sweden				
United Kingdom				

B. Summary regarding the implementation of existing Framework Decisions

0 = no notification of implementing measures (considered as not implemented yet)

1 = implementing measure notified

	AT	BE	BG	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV
Framework Decisions which are already applicable															
FD freezing	1	1	1	partialy	1	1	1	1	1	1	0	1	1	0	1
FD financial penalties	1	0	0	0	1	0	1	1	1	0	0	1	0	0	1
FD confiscation	1	0	0	0	1	1	0	1	0	0	0	0	0	0	1
Framework Decisions which are not applicable yet															
(remplir)															

0 = no notification of implementing measures (considered as not implemented yet)

1 = implementing measure notified

	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK
Framework Decisions which are already applicable												
FD freezing	1	0	1	1	1	1	1	1	1	1	1	1
FD financial penalties	0	1	0	1	1	1	1	0	1	1	0	1
FD confiscation	0	1	0	1	1	0	1	0	1	1	0	0
Framework Decisions which are not applicable yet												
(remplir)												