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NOTE

From: Czech and German Delegations
To: Working Party on Cooperation in Criminal Matters

Subject: Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States
- Questions regarding recent decisions of the Court of Justice of the European Union

The Czech and German delegations would like to discuss on consequences of recent decisions of the Court of Justice of the European Union (CJEU) with respect to European Arrest Warrants.

1. On November 10, 2016 the CJEU issued three decisions which dealt with the notion of 'judicial decision' in Article 1(1) and Article 8(1)(c) and 'judicial authority' in Article 6(1) of FD 2002/584/JHA (Cases C-452/16 PPU (Polotorak), C-453/16 PPU (Öczelik) and C-477/16 PPU (Kovalkovas)). The CJEU held that those terms have to be interpreted autonomously. It came to the following conclusions:

C-452/16 PPU: *“The term ‘judicial authority’ (...) is an autonomous concept of EU law and that provision must be interpreted as meaning that a police service, such as the Rikspolisstyrelsen (National Police Board, Sweden), is not covered by the term ‘issuing judicial authority’, within the meaning of the same Article 6(1), meaning that the European arrest warrant issued by that police service with a view to executing a judgment imposing a custodial sentence cannot be regarded as a ‘judicial decision’, (...).”*

C-477/16 PPU: *“Article 6(1) (...) must be interpreted as meaning that it precludes an organ of the executive, such as the Ministry of Justice of the Republic of Lithuania, from being designated as an ‘issuing judicial authority’, within the meaning of the same Article 6(1), meaning that the European arrest warrant issued by it with a view to executing a judgment imposing a custodial sentence cannot be regarded as a ‘judicial decision’, (...).”*

C-453/16 PPU: *“Article 8(1)(c) (...) must be interpreted as meaning that a confirmation, such as that at issue in the main proceedings, by the public prosecutor’s office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a ‘judicial decision’, within the meaning of that provision.*

We would be very interested in discussion with other Member States concerning those three decisions:

- a) Are there national laws similar to those in Sweden and in Lithuania which could influence the issuing of European Arrest Warrants?
- b) In which way and within which time frame are Sweden and Lithuania going to address the concerns?
- c) How will other Member States react to this case law? Is it possible to arrest and surrender anyone on basis of the EAW issued by 'non-judicial' authority?

2. On September 06, 2016 the CJEU rendered a decision in case C-182/15 (Petruhhin) which dealt with the extradition of a EU member state citizen to a third state. The Court held:

“1. Article 18 TFEU and Article 21 TFEU must be interpreted as meaning that, when a Member State to which a Union citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

2. Where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter of Fundamental Rights of the European Union.”

The decision gives reason to a number of questions which may be dealt with in other ongoing cases of the CJEU. We suggest to discuss some preliminary questions right now:

A) Which authority should be informed?

As long as there are no ongoing investigations, there is no public prosecutor involved. Since the rules on competence for each and every crime probably committed in a third state in a foreign Member State are unknown, there would be difficulties in finding out a direct communication partner. If there is a central authority according to different Framework Decisions it has only competences in international cooperation, however, not in national investigations. Would it be sufficient to inform the embassy or a consulate? (If so we would have to notify our consulates and embassies on the meaning of such information).

B) What information should be conveyed?

Given the fact that the request for extradition concerns the crime which was committed in the territory of the third state it can be presumed that the Member State of the nationality of the person will not dispose of sufficient information to initiate a criminal investigation at national level, which would be the necessary basis for issuance of the EAW for the purposes of the actual surrender of that person. Furthermore, the requested Member State may not be entitled to convey information about criminal proceedings ongoing in the third state to any other state, including the Member State of nationality of the person.

C) Within what time limit should the Member State of the nationality of the person decide whether or not it will initiate criminal proceedings against such person for acts committed out of its territory?

Presuming that preliminary custody for purposes of extradition applies in a number of cases, on what basis would the prolonged time spent in the preliminary custody be justified if the Member State of the nationality of the person would eventually refuse to initiate criminal proceedings against such person for acts committed out of its territory?
