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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: 52nd Plenary Meeting of the European Judicial Network (Bucharest, Romania, 26-28 June 2019)
- EJN Conclusions - Current developments on the application of the EAW

Delegations will find in the Annex conclusions concerning developments on the application of the European Arrest Warrant (EAW), as deriving from the 52nd Plenary Meeting of the European Judicial Network (EJN) (Bucharest, Romania, 26-28 June 2019).



52ND PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK

UNDER THE ROMANIAN EU COUNCIL PRESIDENCY 2019

EJN CONCLUSIONS

CURRENT DEVELOPMENTS ON THE APPLICATION OF THE EAW

Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW FD) remains one of the most effective and frequently used legal instruments in the field of judicial cooperation in criminal matters. Over the years the European Arrest Warrant (EAW) has been discussed within the EJN on numerous occasions due to the fact that the EJN Contact Points remain a reliable channel to facilitate the execution of EAWs¹.

The EJN is closely following and reflecting on the developments on the application of the EAW. The 52nd EJN Plenary meeting provided an opportunity for the EJN Contact Points to address the implications of most recent judgments of the Court of Justice of the European Union (CJEU) on the interpretation of the term “issuing judicial authority” that have direct impact on the issuing and execution of EAWs as well as other arising questions related to detention conditions.

¹ More than 1800 EJN EAW cases have been reported by the EJN Contact Points for 2017-2018.

The EJM Contact Points recognised that the EJM website was a source of relevant and updated information regarding the EAW. They pointed out that there is a need for a dedicated EAW section. This section should provide an easy access to the national practitioners to the most recent developments in the application of the EAW.

I. Public prosecutor as an “issuing judicial authority” - Judgments on Joined Cases C-508/18 and C-82/19 PPU and Case C-509/18 PF

Background information:

On 27th of May 2019 the CJEU published its judgments rendered in Joined Cases C-508/18 and C-82/19 PPU² and Case C-509/18 PF³. The cases raise the same legal question on the interpretation of the EAW Framework Decision 2002/584 (EAW FD), namely whether a public prosecutor’s office constitutes an “issuing judicial authority” within the meaning of Article 6(1) of the EAW FD.

Joined Cases C-508/18 and C-82/19 PPU concern situations where the judicial system is structured in a way where the prosecutors responsible for the prosecution of criminal offences are subordinated to a body of the executive of that Member State, such as a Minister of Justice and maybe subject, directly or indirectly, to instructions/directions from that particular body in connection with the adoption of a decision to issue a European Arrest Warrant. In this case the CJEU concluded that such Prosecutor’s Offices cannot be considered to fall within the concept of “issuing judicial authority” due to considerations of their independence.

² Joined cases C-508/18 and C-82/19 PPU (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1506893>)

³ Case C-509/18 *Minister for Justice and Equality v PF* (<http://curia.europa.eu/juris/liste.jsf?num=C-509/18>)

Case C-509/18 raises the same question, respectively, whether a public prosecutor's office is a judicial authority with the meaning of Article 6(1) of the EAW FD. However, in addition to the issue raised in the Joint cases mentioned above, the executing Court has sought guidance from the CJEU on specific criteria that need to be taken into account when deciding whether a public prosecutor is a judicial authority within the meaning of Article 6(1) of the EAW FD.

Discussions and conclusions:

The EJM agreed that the two judgments of the CJEU had a great direct impact on the procedures in their Member States concerning the issuing and executing of the EAWs and in particular to EAW issued by the German authorities as they were the ones subject to discussion and decision in the Joined Cases C-508/18 and C-82/19 PPU.

While the two judgments leave it open for the executing Member States to interpret on a case by case basis whether the issuing Prosecutor's Office is an issuing judicial authority within the meaning of Article 6(1) of the EAW FD with consideration of the functioning of the legal system of the Issuing Member State, a number of Member States took the initiative to issue special notes with regards to the impact of the judgments for their legal systems. A number of those respective notes have been published on the EJM website. The **EJM Contact Points found it useful to have such information collected by the EJM Secretariat and made available on the EJM website as it is a reference information point** for practitioners when dealing with matters of judicial cooperation in criminal matters and application of mutual recognition instruments.

The EJM noted that after the judgments were rendered and the conclusion of the CJEU that the German Prosecutor's Office cannot be considered as "issuing judicial authority", the **EAWs issued by the German Prosecutor's Office have been flagged** in the SIS, i.e. preventing an arrest for surrender purposes and alert is regarded as being an alert for the purposes of communicating the whereabouts of the person concerned. The EJM Contact Points shared their experiences and legal considerations concerning the execution of pending German EAWs. From the discussions, it became apparent that **in some circumstances some Member States had to suspend their proceedings on pending German EAWs** already while expecting the judgments from the CJEU. After the judgments, in some cases the executing authorities had to suspend the pending German EAW procedures while waiting for an EAW issued by a German Court. In that regard, there have been cases where the persons sought by an EAW have been released.

Another related question with regards to the pending German EAWs that was raised during the discussions was concerning the legal basis upon which the executing authorities in the Member States continue to hold the person in custody pending receipt of a new EAW, issued by a German Court. The EJM noted that in most Member States the EAW which was rendered invalid by the decision **was regarded as a request for provisional arrest**⁴ due to the fact that the EAW presupposes the existence of a national arrest warrant in Germany and as this was sufficient ground for them to keep the person in detention.

⁴ throughout the discussions the EJM Contact Points have clarified that such possibility is found in their national criminal procedure laws and/or international instruments such as the European Convention on Extradition of 1957

Other additional considerations have been addressed by the EJM Contact Points with regards to the criteria introduced by the CJEU judgments, namely that the decisions are contradictory and incomplete. In particular, the EJM Contact Points concluded that the criteria introduced in the judgment, namely two-level protection of legal remedies and fundamental rights⁵ for the subject of the EAW, is not clear and **it is difficult to interpret** and respectively to apply. Additionally, the EJM concluded that the requirement of proportionality was adequately addressed by compliance with the standards in EAW FD on issuing EAWs.

The EJM Contact Points noted the **added value of the compilation prepared by Eurojust** in relation to the CJEU's judgments on the interpretation of Article 6(1) EAW FD and the concept of public prosecutor as issuing judicial authority. The compilation was prepared based on a questionnaire to the national authorities and has been timely disseminated. The EJM discussed a proposal to expand the Eurojust compilation with contribution from EJM in order to potentially address missing information and to include additional questions. The EJM, however, considered that there is no imminent need for practitioners to address additional questions concerning the judgments at this stage but **in case such a need arises, Eurojust and EJM should contribute to the compilation as equal partners.**

The Eurojust delegation further pointed out to two Eurojust projects related to EAW that will be shared with the EJM once they are completed, namely an update of the Overview of Case Law of CJEU on the EAW and Guidelines on Competing EAWs.

⁵ Joined cases C-508/18 and C-82/19, para. 67

Role of the EJN

Information on the EJN website: The EJN recognized the benefit of the EJN Secretariat collecting and sharing the special notes issued by the Member States, following the judgments, on the independence of their public prosecution offices for issuing an EAW. The Contact Points often refer to the notes in ongoing EAW procedures. The notes and their potential subsequent updates, however, would be better placed in a new dedicated EAW area of the EJN website.

Such dedicated area of the website should also include information on (ongoing) updates on the national legislation in the Member States – i.e. The Netherlands indicated that such legislative changes will take place. Additionally, the EJN Contact Points emphasised that it would be useful to gather national case law on this topic and to present it on the EJN website. In this way, and by providing a summary in English, practitioners would be able to get a better picture on the development in the other Member States. The experience, practical and legal problems that are gathered in the Member States should continue to be shared within the EJN to enable all Member States to handle effectively cases that are affected by this judgment.

Facilitating exchange of information: The EJN should keep supporting the national authorities in facilitating the communication between the competent authorities and providing information, when requested, on the national law and the structure of the judicial system.

Follow-up: The EJN should continue to closely follow the developments in the jurisprudence of the CJEU in future related judgments (i.e. the EJN has identified case C-489/19 as related as it seeks further clarifications on the judgments and their interpretation in relation to the Austrian judicial system). The EJN should discuss again the outcome of the judgments and their application in the Member States once more practice has been gathered.

II. **Detention conditions** - Opinion of the Avocat General delivered on April 30th 2019 in the Case C-128/18(Dorobanțu Case)

Background information:

On 30th of April 2019 Avocat General Campos Sanchez-Bordona published his opinion on the Case C-128/18 (Dorobanțu). The judgment in this case is still pending but it is considered as a follow up on the judgment rendered on 5th of April 2016 in Aranyosi and Căldăraru Case⁶ as it is addressing further issues related to detention conditions.

The questions raised before the Court are concerning the level of review that must be carried out by the executing authority of an EAW when making an assessment on the real risk of inhuman or degrading treatment to which the sought person might be exposed if surrendered to the Issuing State. Therefore, the questions seek answers in respect of criteria that need to be taken into account when making the assessment.

The Advocate General in his opinion concluded that the executing authority should make an overall assessment of all the material aspects of the relevant detention facility. A vital element is in the opinion of the Advocate General the minimum personal space that shall be available to the person.

⁶ Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (<http://curia.europa.eu/juris/liste.jsf?num=C-404/15>)

Discussions and conclusions:

While expecting the judgment of the CJEU and anticipating the further impact it may have on the EAW related procedures in the Member States, the EJM agreed that in the last years, detention conditions in the detention facilities of the Member States are very often subject to detailed considerations in surrender procedures of persons in the execution of EAWs. The Contact Points agreed that the current practice shows that the national **executing authorities are closely observing the judgment of the CJEU in Aranyosi and Căldăraru case** in requesting supplementary information from the issuing Member State on the detention conditions⁷ to which the sought person would be exposed pursuant the surrender, in order to determine if the detention conditions would breach the human rights protection ensured by Article 3 ECHR and Article 4 of the EU Charter.

While sharing current national practices, the EJM Contact Points established that within the EAW procedures in the Member States, **the absence of detention conditions compliant with the requirements of Article 3 ECHR and Article 4 EU Charter, is routinely argued as a bar to the surrender of the sought person.** The EJM Contact Points agreed that the main concerns that the issuing authorities are seeking assurances on, is the m² per person in the detention facility. **Some countries are still in focus** with regards to this issue and thus **are often asked for individual assurances** (per case). The Contact Points reported that there have been occasions where executing Member States have requested for as specific detention facility to be completely excluded as a place of detention for surrendered persons, due to the conditions.

Another issue discussed was the increasing practice in some Member States **to question the content of the assurances**, in particular regarding detention conditions that do not in fact exist. Such procedure leads to considerable delays of the decision on surrender. In some instances such issues were resolved by resorting to the possibility of transferring the execution of the sentence to the executing State, on the basis of Framework Decision 2008/909/JHA.

The EJM Contact Points noted that when the judgment in the Dorobantu case is rendered, the question of assurances and detention conditions will have to be reviewed again.

⁷ Ibid, para 104

Role of the EJN

Facilitating exchange of information: The EJN was identified as a key channel for facilitating the communication between the competent authorities. According to the EJN Contact Points they have not encountered difficulties in establishing contact with the other Member States and swiftly obtaining the requested information on detention conditions.

Assurances: On numerous occasions EJN Contact Points have facilitated in cases where there was a need for assurances, e.g. by providing information on the competent national authority to issue the requested assurances and with the actual transmission of the assurances.

Information on the EJN website: The EJN emphasised that it would be useful to gather information on the authorities in the Member States that are competent to issue assurances concerning the conditions in the detention facilities This information should be published on the EJN website, easily accessible to the practitioners.

Follow-up on the case: The EJN will closely follow the developments of the Dorobantu case and will assess its impact on the EAW procedures.

