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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: The impact of COVID-19 on judicial cooperation in criminal matters
- Executive summary by Eurojust of collected information

Please find attached an executive summary by Eurojust of the information collected in WK 3472/2020 REV 3 on the impact of COVID-19 on judicial cooperation in criminal matters in the European Union (and Iceland and Norway).

The impact of COVID-19 on judicial cooperation in criminal matters

Executive summary of Council doc. WK 3472/2020 REV 3

The measures taken at the national level to combat the spread of the coronavirus (COVID-19) are having a significant impact on judicial cooperation in criminal matters in the European Union.

In March 2020, the Council submitted a first questionnaire to the Member States, Iceland and Norway on the impact of said national measures on judicial cooperation instruments. In parallel, Eurojust and EJM also collected information from the Member States on the same topic. In view of the rapidly evolving situation, new questions were then regularly submitted to the Member States by said actors. In light of these developments, in April 2020 the Council gave a mandate to Eurojust and EJM to prepare a compilation of all the information collected so far, to submit new questions to the Member States, Iceland and Norway where needed, and to regularly update the compilation in order to continuously assist practitioners in the application of judicial cooperation instruments in criminal matters in these challenging times.

The present document summarizes the main practical and legal issues identified from an analysis of the replies included in the most recent version of the compilation (Council doc. WK 3472/2020 REV 3) on the following topics:

- Framework Decision 2002/584/JHA on the European Arrest Warrant;
- Extradition from/to third States;
- Directive 2014/41/EU on the European Investigation Order;
- Mutual legal assistance in criminal matters;
- Framework Decision 2008/909/JHA on the transfer of sentenced persons;
- Framework Decision 2003/577/JHA on freezing orders;
- Framework Decision 2006/783/JHA on confiscation orders;
- Framework Decision 2002/465/JHA on Joint Investigation Teams.

1. European arrest warrants

The surrender procedure under the Framework Decision on the European Arrest Warrant (EAW FD) is the main focus of the compilation as European Arrest Warrants (EAWs) affect the personal freedom of the requested person – or at least give rise to a restriction of their freedom of movement - and is by nature an urgent proceeding in all its phases, as provided in Article 17(1) EAW FD. The COVID-19 crisis is having an impact on both the issuing and the execution of EAWs.

In relation to the issuing of EAWs, the vast majority of Member States continues to issue EAWs normally. Yet, **some Member States are prioritising the issuing of EAWs**, either following the adoption of specific guidelines issued by the public prosecutors' offices, where public prosecutors are the issuing authorities or nevertheless trigger the issuing procedure (e.g. limiting the issuing of EAWs only to urgent or very serious cases), or as an indirect result of the general limitations on judicial activities during the pandemic.

As to the execution of EAWs, in general terms, the proceedings opened in the executing Member State for the recognition and execution of EAWs have not been affected and are being carried out normally without significant impediments. However, the measures adopted in the context of the COVID-19 crisis are having a major impact on the last phase of the surrender procedure, as they often lead to **difficulties in carrying out the actual surrender of the requested person** to the issuing Member State after a judicial decision to this effect has been taken. While no Member State has generally suspended the execution of surrenders, in specific cases it may become impossible to transfer the requested person to the issuing Member State on account of the practical and legal measures adopted at national level to combat the COVID-19 crisis. This is the case, for instance, where travel restrictions and flight cancellations are in place, or there are restrictions in place for the escorting officers to travel abroad preventing the issuing State from taking over the requested person. In this respect, the feasibility of each transfer needs to be assessed on a case-by-case basis and often depends on the practical arrangements in place. Transfers taking place by land (e.g. between neighbouring Member States) have a higher chance of success than those that should take place by air. Similarly, **transits of the requested person through the territories of some Member States are not possible**, especially in view of flight cancellations.

Where surrender is not possible in the individual case due to the measures taken as reaction to the COVID-19 crisis, the executing judicial authorities normally **decide to postpone the surrender pursuant to Article 23 EAW FD**. This legal framework is generally considered sufficient to face the current situation.

As regards the specific reason justifying the postponement of surrender, there is not a single common approach among the Member States. While many Member States invoke the circumstances of *force majeure* under Article 23(3) EAW FD, a few other Member States, bearing in mind that the duration of this pandemic is unpredictable, prefer to rely on the serious humanitarian reasons set forth by Article 23(4) EAW FD. Finally, there are several Member States that apply **either Article 23(3) or Article 23(4) EAW FD, depending on the specific circumstances of the individual case**. In both scenarios, a consultation between the executing and issuing authorities is necessary to agree on a new surrender date. However, under Article 23(3) EAW FD it is necessary for both judicial authorities to immediately contact each other and reach an agreement on a concrete new surrender date, which would be necessarily linked to the end of the state of emergency or confinement measures adopted by the Member States involved and that for the moment are being regularly extended. It is noteworthy that the compilation -as a living document- provides updated information on the extension of the state of emergency or any confinement measures deadlines and contains thus relevant information to fix the new surrender date in accordance with Article 23 (3) EAW FD. In contrast, under Article 23(4) EAW FD the authorities involved are initially exonerated from such obligation as it is provided that surrender shall take place as soon as the grounds justifying the postponement have ceased to exist and, therefore, the executing judicial authority shall eventually- and immediately inform the issuing judicial authority and -then - agree on a new surrender date. Furthermore, taking into consideration the indefinite nature of this situation, judicial authorities are prompted to explore the possibilities of having recourse to other measures alternative to surrender (e.g. issuing an European Investigation Order to hear the requested person via videoconference during the trial phase, with their consent, in order to avoid an adjournment of the trial, or taking over the prosecution or enforcement of a sentence).

In the event that surrender is temporarily postponed, the executing judicial authorities are called to review the prolongation of the requested person's arrest until the actual surrender becomes possible. Several Member States have reported some cases where, based on the circumstances of the specific case, prolonging detention would be in conflict with the principle of proportionality and the executing judicial authorities have accordingly **released the requested person and adopted measures to prevent the person from absconding pursuant to Article 12 EAW FD** (e.g. obligation to report to the police, travel ban, probation orders, bail, house arrest). Other Member States, while reporting that no similar cases have occurred yet, also acknowledged that that might happen in the near future. Also in this respect, the importance of consultations with the issuing authorities is underlined in order to refresh the reasons for maintaining the arrest or not.

2. Extradition

Also in relation to extradition requests from third States, the measures adopted at national level in relation to COVID-19 have an impact on the **execution of the actual surrenders, which in several Member States are being postponed to the end of the crisis**. This does not pose major problems in the context of extradition, as these proceedings normally allow the extension of deadlines for surrender.

3. European investigation orders and mutual legal assistance requests

The measures imposed in the context of the COVID-19 crisis have an impact on the issuing, but especially on the execution of other judicial cooperation instruments.

Some Member States indicate that **the issuing of European Investigation Orders (EIOs) or requests for mutual legal assistance (MLA)** continues as usually. Other Member States inform that the issuing of these instruments has decreased and that prioritisation is also applied here. In some of these Member States, EIOs are being issued and translated, but their transmission to the executing Member State is affected, suspended or postponed, except when it is urgent.

In most Member States, **the execution of EIOs and MLA requests has been restricted to urgent cases and/or postponed**, in particular in those Member States where the adopted state of emergency implies the suspension of procedural terms and hearings. Where this prioritisation applies, the main criteria used besides urgency are, for instance, the seriousness of the offence, whether the suspect is under pre-trial arrest, the risk that evidence will be lost and the stage of the proceedings in which the evidence is to be gathered. A case-by-case evaluation in principle applies. Furthermore, even in the Member States that do not apply a prioritisation, delays in the execution are to be expected due to the general confinement measures in place, limiting judicial activity (e.g. remote working of judges and prosecutors). In this respect, **measures requiring physical contact (e.g. searches, hearing in person, etc.) are being postponed or adequate alternatives are put in place** (e.g. hearing of persons is taking place via video- or teleconferences) if feasible. Furthermore, in some Member States, participation by the issuing authorities is either not permitted or allowed only where necessary after an assessment on a case-by-case basis. Non-urgent investigative measures are in principle put on hold.

As to the means of transmission of EIOs and MLA requests, **the majority of Member States recommend electronic transmission of requests (i.e. email)** as the most effective means in the current situation. Most Member States encourage addressing the requests directly to the competent executing authorities, while other Member States recommend sending the request to a centralised email address as the executing authority may not be directly reachable in the current circumstances. Eurojust and the EJM can help with the transmission of EIO/MLA requests, facilitating exchange of information and identification of the competent executing authority.

4. Transfer of sentenced persons

For the time being, **most Member States have suspended the transfer of sentenced persons**. Furthermore, in those Member States where the transfer of sentenced persons is still possible, an assessment is done on a case-by-case basis and urgent cases are prioritised. In such cases, it is also underlined that **the time limit of 30 days for the execution of the transfer under Article 15(1) FD 2008/909/JHA is not likely to be met**. Practical issues encountered by national authorities when carrying out transfer are mainly related to the closure of internal EU borders and the cancellation of flights, as well as situations that require physical contact and medical screening. Sanitary rules are to be observed for the interest of the sentenced persons and the escorting officers.

Persons transferred to other Member States are in principle placed in quarantine. Some Member States specified that decisions on the recognition of judgments continue to be issued.

5. Freezing and confiscation orders

While in many Member States the situation is unchanged with respect to freezing and confiscation orders under Framework Decision 2003/577/JHA and Framework Decision 2006/783/JHA, **several other Member States are prioritising also the issuing of certificates for the mutual recognition of freezing and confiscation orders only in urgent cases.** This is very often not the result of an *ad hoc* policy, but rather an indirect effect of the general limitations on judicial activities. However, this prioritisation **does not usually affect freezing orders as they are generally regarded as urgent** due to the risk of dissipation of assets.

6. Joint Investigation Teams

Joint Investigation Teams under Framework Decision 2002/465/JHA continue to operate regularly in most Member State, with the main difference that **travel and physical meetings are not taking place but are being replaced by electronic communication.**

7. General issues

Another measure having a significant impact also in the field of judicial cooperation in criminal matters is **remote working**, as most judges and prosecutors are working from home, and therefore the activities of the national courts and public prosecutors' offices are limited. Only judges and prosecutors on duty 24/7 can deal with very urgent requests. A case-by-case approach seems to be the predominant one in the present circumstances.