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

Delegations will find attached an executive summary of WK 3472/2020 REV 9, containing a compilation by Eurojust and by the European Judicial Network (EJN) of information received by Eurojust, by the EJN and by the Presidency/General Secretariat of the Council, on the impact of the measures taken by governments to combat the spread of COVID-19 on judicial cooperation in criminal matters in the European Union (and Iceland and Norway) and on the way forward.

The text has been updated with input received by Friday 12 June 2020.

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

Executive summary of Council doc. WK 3472/2020 REV 9

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, Iceland and Norway 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 executive summary gives an overview of 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 6) 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 directly 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 EU judicial authorities continue to issue EAWs normally. Yet, **some 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 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 State after a judicial decision to this effect has been taken and became final. While no State has generally suspended the execution of surrenders, in specific cases it may become impossible to transfer the requested person to the issuing 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 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 States are often not possible**, especially in view of flight cancellations.

However, more recently some States noted that the gradual opening of the borders and resuming of flights **since the beginning of June is slowly bringing the situation back to normal**, allowing the actual execution of surrenders and transits.

Where surrender actually takes place, the majority of the States have adopted additional **precautionary measures** to safeguard the health of the surrendered person and escorting officers, such as the obligation to wear facial masks, gloves and maintaining social distancing. In many States, the surrendered person will also be placed in quarantine upon arrival. In several States, a negative COVID-19 test is also requested for the surrendered person, while in others it is not necessary. In a few States, additional precautionary measures might be taken only on a case-by-case basis. Finally, several States would welcome **further guidance** on such additional measures (e.g. a list of the measures necessary in each country to execute a surrender or common non-binding guidelines at EU level).

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 States invoke the circumstances of *force majeure* under Article 23(3) EAW FD, a few others, 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 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, consult each other on a regular basis, 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 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 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 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.

Finally, to date the majority of the States are not able to anticipate when it will be possible to resume the postponed surrenders. While in certain cases new surrender dates have already been agreed, it cannot be ruled out that a further postponement may take place. The majority of the States have pointed out that this primarily depends on there being fewer flight cancellations.

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

In most States, **the execution of EIOs and MLA requests has been restricted to urgent cases and/or postponed**, in particular in those 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 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, in several States **measures requiring physical contact (e.g. house 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 telephone conferences) if feasible. While in some States it is possible to request the appearance of a person before the competent authorities, in others videoconference is the only possible way to hear a person, or at least it is the preferable way. In a few other States, house searches are being executed normally. Furthermore, in some States, participation by the issuing authorities is either not permitted or allowed only where necessary after an assessment on a case-by-case basis. In general terms, non-urgent investigative measures are in principle put on hold.

However, more recently some States noted that the gradual resumption of judicial activities is **starting to bring the situation back to normal**, also in relation to the issuing and execution of EIOs.

As to the means of transmission of EIOs and MLA requests, **the majority of the States recommend electronic transmission of requests (i.e. email)** as the most effective means in the current situation. Most States encourage addressing the requests directly to the competent executing authorities, while others 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 States have suspended the transfer of sentenced persons**. Furthermore, in those 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 States are in principle placed in quarantine. Some States specified that decisions on the recognition of judgments continue to be issued.

5. Freezing and confiscation orders

While in many 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 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.

However, more recently some States noted that the gradual resumption of judicial activities is **starting to bring the situation back to normal**, also as regards freezing and confiscation orders.

6. Joint Investigation Teams

Joint Investigation Teams under Framework Decision 2002/465/JHA continue to operate regularly in most States, 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 teleworking (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.

However, more recently some States **resumed the judicial activities**, so that the situation is gradually going back to normal.