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- Report (2014-2016)

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Delegations will find attached a Report on Eurojust's Casework in the field of the European Arrest Warrant (2014-2016).

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# I. INTRODUCTION

This Report concerns Eurojust's casework in the field of the European Arrest Warrant (EAW) in the period 2014-2016.<sup>1</sup>

In this period, Eurojust continued to play a key role in improving the application of the EAW. The number of EAW cases registered at Eurojust has steadily increased, from 217 cases in 2013 266 cases in 2014, 292 cases in 2015 and 315 cases in 2016. In addition to the day-to-day operational work, Eurojust's Judicial Cooperation Instrument Team holds regular meetings during which recent EAW cases are discussed in view of identifying difficulties and possible solutions.

This Report is not exhaustive. It focuses on the main issues identified in Eurojust's EAW casework, including legal and practical obstacles in surrender procedures, and explains how Eurojust tried, wherever possible, to overcome them. The following topics are addressed: requests for information (*infra* II); transmission of EAWs (*infra* III); competing EAWs (*infra* IV); time limits (*infra* V); postponement of surrender and problems related to the actual surrender (*infra* VI); and prosecution for other offences (*infra* VII). While the majority of cases in which Eurojust intervened to facilitate the execution of EAWs were bilateral cases, Eurojust also provided important assistance in more complex multilateral cases (*infra* VIII). Eurojust also dealt with some cases in which national authorities were applying *Aranyosi and Căldăraru* and *Petruhhin* case law (*infra* II. 1.4 and IX). Finally, Eurojust also opened four topics in relation to the EAW (*infra* X). The conclusion summarises the main findings of this Report (*infra* XI).

## II. REQUESTS FOR INFORMATION

Eurojust assisted national authorities in relation to requests for information at different stages in the EAW procedure.

### 1. Necessary and supplementary information before taking a decision on the surrender

Pursuant to Article 15(2) of the Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union (EAW FD), an executing judicial authority that finds the information communicated by the issuing Member State insufficient to take a decision on the surrender shall request the necessary supplementary information.

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<sup>1</sup> This Report is a follow-up to the previous Report, which was published as Council document No 10269/14 on 26 May 2014 and which referred to the period 2007-2013.

In its casework, Eurojust was often contacted at a late stage, namely after requests for additional information had remained unanswered despite repeated reminders and when the need for a reply had become extremely urgent. Clarifications, additional information and/or translated documents were needed within a few days, sometimes even within a few hours. Different reasons were mentioned for the urgency of the request, e.g. the suspect was in preliminary custody with strict time limits, the scheduled date for a court hearing was approaching, or the requested person was serving a custodial sentence and would be released soon.

Usually, Eurojust managed to successfully assist the national authorities in obtaining the requested information and in sending it by the set deadlines. However, in a limited number of cases, the requested information arrived too late and the requested person was released. In some of these cases, surrender was still granted, but the requested person had disappeared after his release and had become a fugitive.

Article 15(2) EAW FD mentions, in a non-exhaustive way, different topics on which additional information can be requested, namely the grounds for non-execution (Articles 3-4 EAW FD), guarantees (Article 5 EAW FD) or the content and form of the EAW (Article 8 EAW FD). In Eurojust's casework, many requests for additional information relate to these categories, but some requests for additional information also concern topics outside the scope of these provisions, such as human rights (particularly prison conditions), proportionality issues or questions regarding the use of other instruments.

## 1.1. Content and form of the EAW

In many EAW cases for which Eurojust provided assistance, executing authorities had argued that the EAW had been filled in inaccurately, that some information was missing or that some information was apparently contradictory. All the elements mentioned in Article 8 EAW FD have been subject to requests for additional information in Eurojust's casework:

- **Identity of the requested person:** In some cases, national authorities argued that the EAW had failed to sufficiently establish the identity of the requested person or raised concerns because the requested person's passport had previously been stolen and the person had no criminal record. The correction of the spelling of the suspect's name, additional information on the date of birth and/or the sending of digital files with photographs and fingerprints enabled the identity of the requested person to be confirmed or corrected, and, occasionally, to prevent the surrender of the wrong person.
- **Contact details:** Occasionally, the executing judicial authorities urgently requested Eurojust's support when the contact details of the issuing judicial authority were missing.
- **National arrest warrant:** In some cases, national authorities wanted to know whether the EAW was based on a preceding domestic warrant. Contrary to the case leading to the CJEU's *Bob Dogi* judgement, in which a national arrest warrant was not mentioned because it did not exist, the Eurojust cases concerned EAWs for which a domestic warrant did exist, but the issuing authority had simply omitted to mention it in the EAW. In these cases, a copy of the national arrest warrant was then provided with the name of the investigative judge who had issued the domestic warrant and the date of issuance. In 2016, Eurojust also looked at this topic from a more general perspective, by gathering information on how the Member States had implemented Articles 8(c) and 8(f) EAW FD in their national legislation (see *infra X*).

- **Offence(s) and description of the circumstances:**
  - National authorities requested **further clarification on the offence(s)** that had been committed, the suspect's role or other elements such as when or where the offence(s) had taken place. The required information was sent via Eurojust.
  - National authorities pointed at **discrepancies between the ticking of the box of the Framework list offences and the actual description of the offences** and wondered whether or not the issuing authorities wanted to rely on Article 2(2) EAW FD. For instance, in one case the box of "illicit trafficking in narcotic drugs and psychotropic substances" was not ticked while on the basis of the description it could be seen as falling within that category of list offence, in which case the dual criminality check would not apply. Eurojust assisted in clarifying whether or not the issuing authority considered it as a Framework list offence.
  - National authorities indicated **discrepancies concerning the number of offences mentioned in the description and the number of boxes of list offences that were ticked**. In some cases, this difference could be explained and resolved on the basis of a difference in the legal systems for which, for instance, in one legal order the several components mentioned in the description constituted one offence ('fraud') for which the box "fraud" was rightly ticked. In other cases, the different numbers were incorrect and were rectified.
  - National authorities asked for a copy of the **relevant provisions of the criminal code**, including a translation. In some urgent cases, Eurojust helped with the translation of the relevant provisions.
  - In some cases, finding a solution was **more difficult**, e.g. when issuing authorities started to openly question **whether the requested additional information was actually 'necessary' in light of the EAW FD**. For instance, in several similar cases, national authorities considered the request for **'specific elements of evidence on which the arrest is based'** to be in breach of the EAW FD and the recommendations made, in this regard, during the Fifth Round of Mutual Evaluations. While sharing the concerns raised by the issuing authority, Eurojust nevertheless tried to facilitate the surrender by explaining what type of information was requested. Similar concerns were raised in cases in which executing authorities were **extremely demanding with regard to the description of the offences**. While the issuing authorities had already once or twice re-issued an EAW to elaborate further on the description of the offence, the executing authorities were still not satisfied. Despite attempts from Eurojust to find a compromise solution, executing authorities sometimes insisted on the need **to re-issue an EAW** for the second or third time, and the issuing authorities simply refused to do so. Consequently, surrender was refused and the case was closed.

- **Sentence:** Issuing authorities were requested to clarify issues related to ‘**aggregate sentences**’ or ‘**merging of sentences**’ or to explain whether the requested person had been **in detention** in relation to any of the judgements and **how much time he/she would still need to serve**. Issuing authorities were also asked to give information on **time limitations for the execution** of the custodial sentence in view of a possible decision to postpone the surrender. In several cases, information was requested on the ‘**final nature of the sentence**’, which in one case led the issuing authority to (temporarily) withdraw the EAW when it realised that an appeal had been lodged and that the sentence was thus not yet final. In many other cases, the sentence was indeed confirmed as final and national procedures, initiated by the requested person against the sentence, had been dismissed. In some cases, in which surrender would only be granted for part of the offences, the executing authorities wanted to be informed whether the issuing authority would be capable of **adapting the sentence** to exclude the part of the sentence that related to the offences for which surrender would not be granted. Some issuing authorities explained, in this regard, that they were reluctant or in a difficult position to perform such sentencing exercise, which then hampered the execution of the EAW.
- **Date, signature, stamp:** In a few cases, the EAW had not been signed, or had not been signed by a competent judicial authority. In other cases, the date was missing, a wrong date was mentioned, a more legible EAW was needed, or an original EAW with stamp was requested. In all these cases, Eurojust facilitated the issuing of new EAWs that met the requirements.
- **Translations:** National authorities struggled, but generally managed, with the language requirements of the EAW FD. However, in some cases, executing authorities required a translation of the EAW itself as well as a translation of additional information, e.g. the relevant legal provisions of the issuing Member State’s criminal code. In most cases, Eurojust helped to provide the requested translation within a tight deadline.

## 1.2. Grounds for non-recognition

In a considerable number of Eurojust cases, grounds for non-recognition were invoked by the executing authority. The grounds for non-recognition that Eurojust dealt with mostly concern:

- **Ne bis in idem:**
  - **Same acts (*idem*):** In some drug- and fraud-related cases, the requested person had argued that the acts underlying the EAW constituted the ‘same acts’ as those that had been dealt with in a previous conviction or in an ongoing procedure in another Member State. Retrieving the relevant information for making the assessment in cases in which the previous decision had been taken some time ago, in another Member State, and old files had been destroyed was particularly difficult for the executing authority. Often, the executing authority did not have this information, and had not been able to obtain it via direct contact. The assessment was then made on the basis of information exchange via Eurojust. Depending on the outcome of the assessment, surrender was granted, refused, or granted for some of the offences.

- **Final judgement ('bis')**: In several cases, Eurojust helped clarify the meaning of a 'final judgement'. For instance, in a case that related to a situation in which a person had died during a kayaking accident and the kayak instructor had been held responsible for negligent homicide, the question arose whether a prior decision of a 'Coroner's Court' did or did not constitute a 'final decision' within the meaning of Article 54 of the Convention Implementing the Schengen Agreement (CISA). After clarification with the competent authorities of the Member State in which the coroner proceedings had been held, the competent authorities concluded that 'coroner proceedings' did not constitute criminal proceedings and thus that *ne bis in idem* was not an issue. In another case, the requested person had informed the issuing authority about an official decision of a prosecution office in the executing State, which had closed the case on the basis of a lack of evidence. Since this information was only provided a few days before an important court hearing, the issuing authority needed to verify, urgently, the accuracy of this information. Via Eurojust, the issuing authority learned from the executing authority that the decision to close the case due to lack of evidence had been overruled by a Deputy Prosecutor General in the executing Member State. The swift exchange of this relevant additional information thus helped to clarify that here was not a breach of the principle of *ne bis in idem*.
- **Consequences of the non-removal of an EAW from SIS II and INTERPOL databases**: In its casework, Eurojust became aware of a risk of non-compliance with the principle of *ne bis in idem* in cases in which the EAW had not been withdrawn despite the existence of a final judgement for the same acts. In 2014, Eurojust also dealt with this issue from a more general perspective (*see infra X*).
- **Dual criminality**: On the basis of Eurojust's casework, 'dual criminality' does not seem to be, generally speaking, a major obstacle in the execution of EAWs, as explained by the fact that most of the offences in Eurojust's casework are 'list' offences for which the dual criminality check has been abolished. Two acts, however, seem to create some problems in terms of 'dual criminality', namely parental child abduction and participation in a criminal organisation.
  - **Child abduction** – Several Eurojust cases involve executing authorities that refused to surrender. Some authorities stated that the abduction did not constitute an offence under the executing Member State's law. Others argued that one of the constituent elements of the offences was missing (e.g. acting 'with force'). Others noted that they would only surrender 'if the requested person did not have or was denied parental rights *and* the criminal conduct took place outside the executing Member State'. Others explained that, under their legislation, child abduction is a civil matter. In one case, the executing authority based its argument not so much on the *executing* Member State's legislation, but argued that surrender could not be granted because the acts had been committed *before* the offence had been included in the *issuing* Member State's criminal code. Even after the issuing authority had clarified that it concerned a continuous crime, the executing authority still refused to surrender.

- **Participation in a criminal organisation** – Despite the fact that this is a so-called ‘list offence’, for which the dual criminality check has been removed, dual criminality issues have been raised on more than one occasion. Problems have been created, particularly as participation in a criminal organisation is not an autonomous offence in some Member States. In a few cases, the executing authority refused to execute an EAW if the actual offences committed by the criminal organisation were not mentioned in the EAW. Issuing authorities then replied, on the basis of Article 2(2) EAW FD, that the ‘dual criminality’ ground could not be used. Eurojust transmitted these pertinent concerns to the executing authorities and tried to find a solution. In most cases, though, another ground for non-recognition was then decisive, since the offences had been (partially) committed on the territory of the executing Member State (territoriality ground/statute bar).
- **Statute-barred offences:** In a few cases handled by Eurojust, surrender was refused due to the fact that the offence was statute-barred in the executing Member State and the acts were (partially) committed on the territory of that State. In these cases, Eurojust’s role was usually quite limited. In some cases, Eurojust facilitated the exchange of information on how the date of prescription should be calculated and/or on the duration of the offence. In other cases, Eurojust explained how the provisions on prescription in the executing Member State should be understood. The offences that were statute-barred were quite diverse, e.g. criminal organisation of sham marriages, theft, fraud and murder.
- **Nationals or residents:** In a number of cases, the surrender for the execution of a custodial sentence was refused due to the fact that the requested person was a national or a resident of the executing Member State and this State preferred to execute the sentence itself. In such cases, Eurojust often facilitated the exchange of additional information, such as a certified copy of the sentence to be served, certified information on the date when the judgement became final, and/or certified information on the remaining time to be served. In some cases, the issuing authority wished to be informed by the executing authority how this ground for non-execution was implemented in the executing Member State’s legislation and how the sentence would be executed in accordance with that legislation.
- **Ongoing prosecutions for the same acts in the executing Member State:** In some cases, national authorities refused to execute the EAW *not* because national proceedings were already ongoing in their Member States, but because, following the receipt of the EAW, they wanted to initiate prosecutions themselves on the sole ground that the suspect and/or the victim were nationals. Issuing authorities questioned whether such an interpretation would be covered by that specific ground for non-recognition, the context of the EAW FD and the underlying principle of mutual recognition. Moreover, in some of these cases, issuing authorities were only informed that (parallel) investigations would be launched, but then failed to receive afterwards, despite attempts via Eurojust, any comprehensive follow-up on the state of play of these investigations in the executing Member State. In other cases, Eurojust’s intervention was more successful. For instance, in a case in which parallel proceedings were taking place, Eurojust facilitated the exchange of information and evidence and organised a coordination meeting, thus gaining a clearer picture of the investigations in both States. Eurojust’s coordinating role in this case was decisive in the court’s decision to grant the surrender.

- **Territoriality ground:** In some cases, the preceding ground of ‘**ongoing prosecutions for the same acts**’ was combined with a ‘**territoriality**’ argument. Executing authorities refused to execute EAWs, often related to drug offences or offences committed within a criminal organisation, because the acts were partially committed on their territory and they would initiate/had initiated criminal proceedings themselves. In some cases, Eurojust organised coordination meetings, played a mitigating role and assisted authorities in deciding on the best place to prosecute. Generally, a commonly agreed solution was found, surrender was granted and/or transfer of proceedings took place. While in most cases a common understanding was reached on why an executing authority would not execute the EAW, the authorities in other cases had fundamentally different views on where **the majority of the criminal acts** had taken place, and, consequently, had difficulties in understanding why the execution was refused.

### 1.3. Guarantees

In its casework, Eurojust intervened, on several occasions, to facilitate or speed up the sending of guarantees regarding life sentences, *in absentia* judgements or the return of nationals/residents, or to clarify issues with regard to one of these guarantees.

- **Life sentences:** In several cases, Eurojust helped to overcome differences between national legislations and facilitated the surrender by clarifying the meaning and the application of ‘life sentences’ in the legislation of the issuing Member State. In other cases in which, after repeated reminders, no guarantees had been given and the EAW was put on hold, Eurojust speeded up the process by facilitating communication among the authorities so that guarantees could be sent and the surrender could take place. In its casework, Eurojust also came across an interesting question in a case in which the life sentence guarantee itself was not an issue, but rather the fact that the requested person, if surrendered, could face the imposition of a *second* life sentence. In that case, the requested person had received a life sentence in the executing Member State for murder and was subject to prosecution in the issuing Member State in an unrelated murder, for which he faced the imposition of a second life sentence. Since the life sentence already imposed on him in the executing Member State would not be absorbed by or included in the second sentence to be imposed in the issuing Member State, the executing authority concluded that the requested person would have no perspective to be released from prison during his lifetime. The executing authority, considered that this situation was in breach of the national constitution, and therefore refused the surrender. In sum, the fact that no EU-level legislation requires that a (life) sentence imposed in one Member State be absorbed by or included in a subsequent sanction in another Member State<sup>2</sup> can thus constitute an obstacle for the execution of an EAW. In the above-mentioned case, Eurojust suggested that the competent authorities consider a possible transfer of proceedings to the executing Member State so that the requested person could still be sentenced for the second murder, while ensuring that the life sentence already imposed on him in the executing Member State could be absorbed by or included in the second sanction.

<sup>2</sup> See, *particularly*, Article 3(3) and recital 14 of Framework Decision 2008/678/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

- ***In absentia* judgements:** Despite the improvements made by FD 2009/299/JHA, Eurojust still intervened in several cases to help clarify *in absentia* issues. In most cases, the executing authority wanted additional information with regard to the EAW form, e.g., how it had been unequivocally established that the requested person was aware of the scheduled trial; whether the accused voluntarily seeking to avoid trial could be proven; how accurately the requested person had been summoned or notified about the trial; or whether the requested person had or had not been represented by a lawyer. In some cases, the executing authority wanted to receive more information on the national implementation of FD 2009/299/JHA and was particularly interested in learning to what extent the requested person had an unequivocal right to a retrial - with no discretion for the court - and which time limits would apply to a request for retrial. Additionally, in some cases, a copy of the relevant provisions of the criminal procedural code, in authenticated form, was requested and transmitted via Eurojust, so that it could be used in court as evidence. In most cases, the risk of a breach of a fair trial was discarded and the surrender was granted.
- **Return of nationals/residents:** Eurojust intervened when, despite several reminders, no guarantees were sent, when questions arose about which authority could give the return guarantee, or when other issues needed to be resolved. For instance, if a return guarantee was given, then issuing a *new* EAW was not necessary to send the person back to the executing Member State, as this step was covered by the initial EAW. In addition, an issuing authority could not have in its return guarantee a sentence prohibiting conversion of the sentence. In another case, Eurojust's intervention brought to light that a return guarantee had erroneously been requested, as the requested person was neither a national nor a resident/person staying in the executing Member State and, consequently, the request for a return guarantee was withdrawn. Other cases specified by when -at the latest- the requested person would return.

## 1.4. Human rights – prison conditions

Already prior to the *Aranyosi and Căldăraru* judgement, Eurojust was involved in cases in which judicial authorities were experiencing difficulties with the execution of EAWs due to allegedly inadequate prison conditions in the issuing Member State. The term 'inadequate' is considered broadly here and covers both problems related to overcrowding, specific conditions of the cells and problems of inadequate medical care.

Eurojust helped to explain, even before the *Aranyosi and Căldăraru* judgement was delivered, the **ratio legis** of this type of request and/or the need for giving the requested information.

Eurojust assisted in cases in which issuing authorities were **requesting specific information**, e.g. in which prison will the person be detained? How much personal space will he have? What purposeful and/or outdoor activities will be available? Will the requested person be detained for the entire duration of his sentence in that prison?

In some cases, Eurojust's involvement was limited to **transmitting – urgently** – requests for information to the competent authorities in the Member States and to **obtaining – urgently** – the requested information **within tight deadlines** set by the national courts. In other cases, Eurojust helped to identify the appropriate authorities in the issuing Member State with whom the authorities of the executing Member State could then further liaise.

In other cases, Eurojust was requested to play **a more substantial role** and organised level II meetings and coordination meetings during which prison conditions in the issuing Member States were discussed at length. In its casework, Eurojust has helped to **clarify how the requested information should look** (both content- and format-wise), who should be the author of the reply and by what deadline the response should be given.

In a limited number of cases, issuing authorities could not be convinced to deliver certain information. In other cases, the required information arrived too late and the EAW was dismissed. In many cases, however, fast and efficient intervention by Eurojust facilitated the finding of an adequate response within the tight deadlines imposed by the national authorities.

## **1.5. Proportionality, scope of the EAW and use of other instruments**

For the period 2014-2016, Eurojust was only rarely exposed to cases in which proportionality issues were raised in relation to the seriousness of the offence and/or the level of the penalty imposed.

In some cases, Eurojust did not consider the EAW to be the appropriate instrument to be used and, successfully, suggested that the authorities use another measure, e.g. an MLA request for a hearing. At Eurojust's suggestion, the EAW was then revoked on the ground that the **EAW was not the adequate instrument**. For instance, in one case the requested person was not sought for prosecution/execution, but was only required to make a statement before the judicial authority to **fulfil a procedural guarantee**, namely the right to be informed of the investigation before he was formally accused. For that purpose, the person was heard via videoconference on the basis of an MLA Convention. In another case, the EAW was withdrawn after clarification, via Eurojust, that the requested person, instead of serving a custodial sentence, had the **alternative to pay a fine**, and, on the basis of the information provided, the requested person had undertaken numerous efforts to comply with this payment. After discussions among the competent authorities, the EAW was finally withdrawn, and efforts for cooperation then focused on the payment of the fine. In other cases, the EAW was not executed since the case did not fall within the scope of the EAW FD, and an alternative, more appropriate, measure was also not available. For instance, surrender was not granted in a case in which the executing authority was informed that the maximum sentence that the requested person could get in the issuing Member State was a **conditional imprisonment sentence**.

In a few other cases, proportionality was discussed in the broader context **of human rights**, particularly Article 8 ECHR (right to family) and the passage of time. For instance, in one case, Eurojust was asked to explain the reasons why the EAW had not been executed. In that case, the executing Member State's court had decided that despite the seriousness of the offences (theft and fraud), *'this is one of those very rare cases in which the Article 8 right of the requested person and his son outweighs the public interest in this country complying with its international obligations in respect of extradition'*. The judge believed that if the requested person was surrendered, the effect on his son of being effectively abandoned by a second parent as a result of the surrender would be very considerable, and concluded that allowing the surrender would therefore be disproportionate. In another case, in which Eurojust was asked to facilitate the exchange of information, the executing authority had serious concerns with regard to the surrender of a person in his sixties in relation to a small drug offence committed 20 years earlier, while he had not committed any other offence during that 20-year period. Additional information was requested, but, unfortunately, only at a very late stage. Despite Eurojust's fast intervention, which facilitated the exchange of information, including the necessary translation, the executing authority refused to admit the information so late and withdrew the EAW.

In some cases, national authorities requested assistance with regard to which instrument to use (EAW FD or 2008/909 FD on transfer of prisoners). In other cases, national authorities considered which legal basis to apply if the other Member State had not yet implemented the 2008/909 FD.

National authorities also asked Eurojust for clarification as to which type of information was needed under the 2008/909 FD, and Eurojust also assisted authorities in obtaining this information. In some cases, Eurojust also agreed with national authorities on extending the imposed national time limit for the documents, as, according to the executing Member State's legislation, the documents could only be sent when the judgement was final, and the person's mere waiving of his right was not sufficient in that regard.

In another related case, both Member States had implemented the 2008/909 FD, but had used instead the 1983 Convention. The transfer decision was annulled by a national court due to the wrong legal basis and the absence of the required 2008/909 FD certificates. Eurojust facilitated the transmission and translation of these documents, in the required language, and offered to forward to the authorities the certificate and the notice once filled in by the other authorities.

## **2. Information on the state of play of the EAW proceedings**

Both the executing authority and the issuing authority often requested Eurojust's assistance, particularly to obtain information on the state of play of an EAW request. Issuing authorities wanted to be informed whether: i) the EAW had been received in good order, ii) it was ready for execution, iii) the person was kept in detention, iv) any obstacles had been identified, and v) the executing authority was interested in executing the sentence itself.

In general, the fact that the executing authority had not yet replied did not always mean that the execution of the EAW was at risk. Sometimes, the procedure was simply ongoing or an appeal had been launched. In most cases, Eurojust's intervention enabled a fast reply on the state of play with an (estimated) date of the hearing and information on when the decision would be final. In other cases, the executing authorities were informed, via the intervention of Eurojust, that the EAW had been withdrawn by the issuing authority and that execution was no longer requested. Executing authorities were then often frustrated by the time, effort and human resources they had dedicated to the execution of the EAW and they wanted - at the very least - a valid reason as to why the EAW had been withdrawn.

Therefore, the role of Eurojust in speeding up the execution of the EAW is very important from both perspectives, whether the issuing authority is waiting for the state of play of the EAW or the executing authority needs some information and/or a document.

### **3. Follow-up information after a decision on the EAW has been taken**

Eurojust also helped to obtain and provide information at a later stage, namely after a decision to execute the EAW had been granted or dismissed.

In case of dismissal, issuing authorities tried to obtain via Eurojust the exact reasons for the refusal and sometimes asked whether re-issuing an EAW, subject to certain conditions, could be successful.

In cases for which the execution of the EAW had been granted, issuing authorities mostly had questions about **the duration of the detention period in the executing Member State, or, at the same time, why the EAW had not yet been yet executed and the requested person had not been surrendered to the issuing Member State.** For instance, regarding the duration of the detention period, issuing authorities needed to know the exact date that the requested person was arrested and put into detention on the basis of the EAW or related offences so that they could deduct this time from the custodial sentence to be imposed. While some executing authorities generally were well-informed about how much time in total a person had spent in custody, some had far more difficulty in determining the exact amount of time the person had been in custody in respect of the domestic proceeding and the exact amount of time in respect of the EAW. The executing authorities did not always understand why this specific information was needed, but were then informed via Eurojust.

In some cases, the executing authority had agreed to execute the custodial sentence itself because it concerned a national or resident of the executing Member State. Eurojust assisted national authorities of the issuing Member State in obtaining **information on the actual state of the execution of the sentence.**

### III. TRANSMISSION OF EAWS

Occasionally, Eurojust was asked to intervene if problems occurred in relation to the chosen means of transmission (Articles 9-10 EAW FD). Despite the fact that the EAW FD encourages authorities to send the EAW directly to the executing authority if the location of the requested person is known, practice shows that, on many occasions, even if the location is known, or contact details are mentioned, some national authorities seem to prefer the use of Sirene, police channels or central authorities rather than 'direct contact'. Unfortunately, these information flows are not always as effective as they should be, and Eurojust is then asked to intervene and facilitate the exchange of EAWs or additional requests for information.

In some cases, Eurojust helped to identify and resolve errors in the Sirene flagging. In other cases, Eurojust helped to clarify the reasons for flagging (for instance, a pending investigation).

### IV. COMPETING EAWS

According to Article 16(2) EAW FD, Eurojust may be requested by the executing judicial authority to provide advice on which of the EAWs should be executed when the requested person is subject to EAWs issued by two or more Member States ('competing EAWs').

During the period from 2014 - 2016, Eurojust continued to assist national authorities in the context of Article 16(2) EAW FD, and was formally requested to provide such advice in 17 cases. Additionally, in a few cases, Eurojust also provided essential assistance if an EAW was competing with an extradition request.

Contacting Eurojust has several advantages. It can quickly provide an opinion to the national authorities, and also can provide the executing authority with all the relevant information on the EAWs, so that the competent authority can take an informed decision. In this regard, Eurojust was requested on several occasions to seek, within tight deadlines, the views of the 'competing' issuing authorities on the priority to be given, and to ask for clarifications on specific questions, such as whether the EAW had been issued for prosecution or for the execution of a custodial sentence, the seriousness of the offences, the facts of the case (to see whether or not the case concerned a *ne bis in idem* situation), statutes of limitation or the state of play of the investigations.

Eurojust often organised level II meetings, with representatives from the National Desks concerned, and issued, on the basis of the *Eurojust Guidelines for Deciding on competing EAWs (2004)* and the additional information provided by the issuing authorities, a formal, non-binding opinion on which EAW should be executed (first). Usually, this opinion was drafted jointly by the National Members or other representatives from all the Desks concerned. In some opinions, depending on the particularities of the case, the possibility of a temporary surrender was suggested to the national authority that requested the opinion.

In cases for which EAWs were issued in relation to two (or more) different offences, Eurojust specified in its opinions which EAW should be executed *first*, and also often insisted on the need to take a decision on the subsequent surrender, an element that is crucial to the issuing Member State, and rendered further requests to the executing State at a later stage, unnecessary.

From the information provided by the national authorities, Eurojust's opinions on which EAWs should be executed first are, generally, accepted by national judicial authorities. However, Eurojust's suggestion to also agree with a 'subsequent surrender' (Article 28(1) EAW FD) seems for the national judicial authorities from some Member States to be more problematic, particularly if the Member State concerned did not implement Article 28(1) EAW FD into its national legislation or the Supreme Court had ruled that a decision on subsequent surrender was not covered by national legislation. Authorities from these Member States then chose not to indicate in their decision which EAW should be executed first, but instead chose to execute only one EAW and refused to execute the other. In some of these cases, urgent follow-up and coordination action via Eurojust was needed to ensure that the person, after his/her surrender to one of the issuing Member States, would not be released.

Eurojust's casework also shows that in those Member States in which the execution of EAWs is decentralised, the co-existence of two (or more) EAWs was sometimes discovered when different national authorities of the executing Member State were already in the process of taking (parallel) decisions on the execution of these competing EAWs. As the actual surrender had not yet taken place, the priority of execution still needed to be decided upon. Even though the executing authority did not consider this case to be an Article 16 EAW FD scenario, Eurojust was still requested to assist, and provided an opinion taking into account the Eurojust *Guidelines for Deciding on competing EAWs (2004)*.

## V. TIME LIMITS FOR THE DECISION TO EXECUTE THE EAW

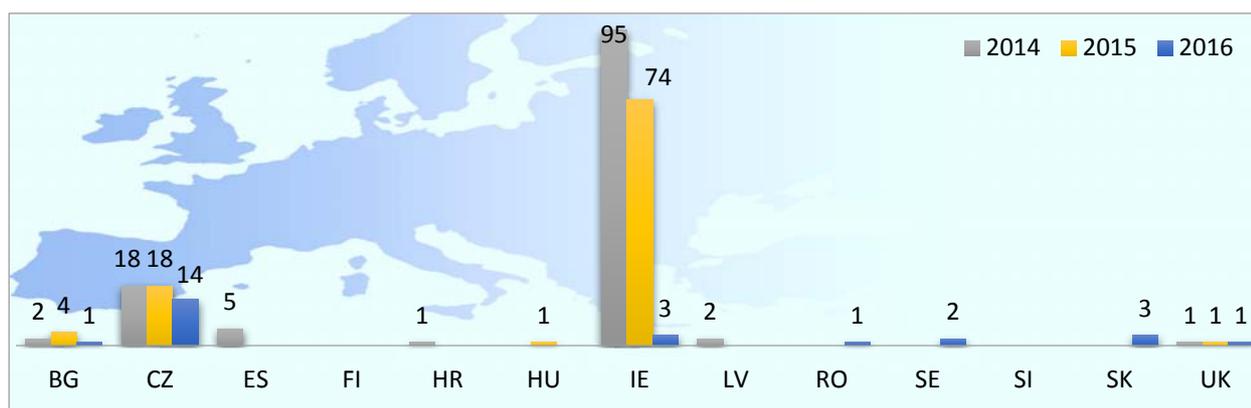
According to Article 17(7) EAW FD, if a Member State cannot observe the time limits provided for in Article 17 EAW FD, it shall inform Eurojust, giving the reasons for the delay. When notified of breaches of time limits in the execution of EAWs, Eurojust can contribute to reducing delays in the execution of EAWs and to improving the smooth operation of EAW proceedings, both at operational and strategic levels.<sup>3</sup> On the basis of the information received by Eurojust, far-reaching conclusions are difficult to make.

The chart below provides the number of notifications of time breaches per year per Member State. The chart clearly shows that notifications of time breaches are concentrated in a few Member States. The fact that the majority of Member States have not notified Eurojust of any breach in the period 2014-2016 can be explained in two ways: either time breaches only occurred in the notifying Member States or some Member States did not comply with their notification duty.

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<sup>3</sup> See, further, Eurojust Note on Notifications to Eurojust of breaches of time limits in the execution of European Arrest Warrants (Article 17(7)(first sentence) EAW FD), Council doc. 10270/14, 26 May 2014.

Number of notifications of time breaches per year per Member State



On the basis of the notifications that were made to Eurojust in the past two years, the ‘length of appeal proceedings’ and ‘requests for additional information’ seem to be the main reasons for non-compliance with time limits. This conclusion should, however, be read with an important caveat, namely that in more than 75 per cent of the cases in which breaches of time limits were notified, no reasons were given for the delay in the execution of the EAW.

## VI. POSTPONEMENT OF SURRENDER AND PROBLEMS WITH THE ACTUAL SURRENDER

According to Article 23 EAW FD, the requested person shall, in principle, be surrendered not later than 10 days after the final decision on the execution of the EAW. Exceptions are foreseen in the event of *force majeure* (Article 23(3) EAW FD), serious humanitarian reasons (Article 23(4) EAW FD), or in the event of prosecution or execution of a sentence in the executing Member State (Article 24(1) EAW FD). In its casework, Eurojust has come across cases that fell within each type of exception. Eurojust’s assistance was also requested in relation to other issues involving the actual surrender.

### 1. *Force majeure*

In Eurojust’s casework, a difference can be noted between convincing *force majeure* cases, for which national authorities demonstrated understanding and willingness to agree on a new surrender date, and less convincing *force majeure* cases, for which issuing authorities ended up being disappointed and frustrated in light of the circumstances that occurred.

Authorities easily and quickly agreed on a new surrender date in several cases in which surrender was postponed due to **terrorist attacks** at an airport or due to sudden **strikes of air personnel**. In these cases, Eurojust made sure that the issuing authority’s request reached the executing authority in time, so that authorities could agree on a new date within the tight deadlines.

Issuing authorities demonstrated less understanding in a number of cases in which surrender was postponed due to the fact that **the requested person**, who was released on bail or under a regime of conditional bail, **had not shown up at the airport**, where police officers from the issuing authorities were waiting for him. Issuing authorities that encountered this kind of problem - often on repeated occasions - started complaining about the costs they had incurred, and claimed from the executing authority a partial refund. The issuing authority also requested Eurojust's intervention to reflect on solutions to avoid this situation from recurring. In some of the cases involving Eurojust, the executing authority took a decision to put the requested person under house arrest and subject to necessary police surveillance measures to ensure a successful surrender. In other cases, attempts to get a guarantee from the executing authority 'that the requested person would be taken by police officers to the airport' failed, and the executing authority and the National Desk involved explained that under the executing authority's legislation on conditional bail, no additional coercive measures could be applied unless a person breached a bail condition. Only at that point can the person be arrested, returned to court and his/her custody status reviewed. After further discussion, agreement was reached that although the police do not routinely visit the residence of a person on bail, a check could be done. Even though this check did not guarantee the appearance of the suspect at the surrender point, it could highlight a breach of any residence condition, which could then trigger arrest and detention. In some cases, such checks were successful and surrender succeeded. In other cases, measures to supervise the conditions of bail were taken too late and by the time the discovery was made that the requested person had breached his bail conditions, that he had disappeared and that surrender would most likely fail, airplane tickets had already been bought and/or other practical arrangements had been made. In some of the cases in which Eurojust intervened, an additional point of concern was the need to find a new date for the surrender, within very tight deadlines, while, at the same time, ensuring that the person was held in custody so that surrender could succeed.

## 2. Humanitarian reasons

Eurojust assisted in a number of cases in which humanitarian issues were at stake. For instance, if the requested person was living with **young children** and executing authorities feared that the surrender would be a traumatic experience for them, the executing authorities decided to postpone the surrender and reflected, with Eurojust's support, on possible solutions. In most of these cases, surrender succeeded. In some other cases, the requested person disappeared before a solution could be found. In situations in which the requested person suffered from **a serious physical or mental illness**, Eurojust intervened to find solutions. In some cases, the executing authority was first reluctant, and surrender could take place only after the issuing authority had provided clear guarantees with regard to a specific medical treatment or after a specialised medical air transport was arranged. In a few other cases, if surrender was not an option, Eurojust suggested withdrawing the EAW and instead issuing an MLA request for an interview, so that information could be obtained to enable the issuing authorities to finalise their proceedings. In other cases, Eurojust facilitated the exchange of information and played a mitigating role, e.g. when issuing authorities openly questioned the reliability of a medical report from the executing Member State.

### **3. Ongoing prosecution or execution of a sentence in the executing Member State**

If, in the executing Member State, the requested person is the subject of an ongoing prosecution or the requested person is serving a sentence there, the executing authority can decide to either postpone the surrender (Article 24(1) EAW FD) or to temporarily surrender the person to the issuing Member State (Article 24(2) EAW FD). In Eurojust's casework, executing authorities applied both options in a considerable number of cases.

In many cases in which a Member State could not surrender the requested person due to an ongoing investigation or an execution of a sentence in the executing Member State, Eurojust successfully assisted national authorities in reaching an agreement on a temporary surrender. In a number of cases, in which authorities first decided to postpone the surrender until the execution of a custodial sentence was served Eurojust suggested that the executing authorities consider a temporary surrender so that the issuing authorities would be able to continue with their ongoing investigations.

In a few cases, and for different reasons, however, the executing authority did not agree with temporary surrender. For instance, in one case, the requested person was serving a custodial sentence in the executing Member State for trafficking in human beings and sexual exploitation, and the executing authority was of the opinion that the co-existence of different factors - including the seriousness of the facts, the requested person's minor role in the offences committed in the issuing Member State, the risk of escape and the risk for the victims - outweighed the potential benefits of a temporary surrender. In that case, an MLA request was found to be the only option. In other cases, temporary surrender was not granted due to other reasons, such as the lack of a fixed trial date in the issuing Member State, making the exact duration of the temporary surrender vague and uncertain, or the complex nature of the proceedings in the executing Member State, or the lack of a legal basis for the requested person's continued detention during the temporary surrender. In other cases, temporary surrender was granted, but Eurojust was asked to clarify the temporary nature of the surrender. For instance, in one case, an internal problem was caused within the issuing Member State, which had not accurately drafted the initial EAW. A new EAW needed to be issued in which the temporary transfer condition was specified. In other cases, Eurojust supported the drafting of the agreement for temporary transfer.

In 2014, Eurojust also looked into the topic of temporary surrender from a more general perspective, by gathering information on how the Member States had implemented this provision in their national legislation, both as issuing and as executing Member States (*see infra X*).

## 4. Other issues

Eurojust also facilitated the execution of EAWs in cases in which other practical issues in relation to the actual surrender arose. For instance, Eurojust helped to obtain the consent of a Member State for a **transit**, and urged the executing authorities not to release the suspect before the transit permit had been granted. Eurojust helped organise a **simultaneous transport** of two persons, requested more or less at the same time by an executing authority for two unrelated cases. Eurojust assisted in arranging at the last minute a new surrender date due to the lack of a **valid passport** for the requested person. Eurojust also benefited from its close relations with **third States** by arranging the agreement of third State authorities to escort the requested person from the third State to the executing Member State.

## VII. PROSECUTION FOR OTHER OFFENCES

Eurojust's casework indicates that, on several occasions, the application of the 'speciality rule' (Article 27 EAW FD) turned out to be rather cumbersome. Eurojust was involved in helping to clarify different issues in relation to the application of this provision.

- **Lack of reply or explanation:** In many cases, Eurojust's role consisted in speeding up the proceedings. In several cases, the executing authorities did not reply when they were asked for consent, while the issuing authority urgently needed such consent as the indictment either needed to be sent to the requested person or the proceedings would start soon. In some cases, the executing authorities refused to give consent without providing any further explanation, and Eurojust was then contacted to find out why the consent had not been given. In some cases, the lack of reply was due to a coordination problem, as several courts were involved in the decision-making process in the executing Member State.
- **Competent authority:** In some cases, Eurojust helped to determine the competent authority to give consent in the executing Member State.
- **EAWs, MLA requests and transfer of proceedings:** In some cases in which an EAW had been executed, along with Letters of Request and transfer of proceedings, Eurojust helped clarifying whether a consent was needed. In 2015, Eurojust also took a more general approach to this issue, by gathering information on how the Member States applied the speciality rule in cases in which the EAW was followed by a decision to transfer a prisoner (*see infra X*).
- **Accuracy in the drafting/reading of issues related to the 'speciality rule':** In several cases, Eurojust assisted issuing and executing authorities in matters related to the speciality rule. In some cases, the issuing authority had not clearly indicated for which additional offences it required consent and then needed to repeat the request for consent. In other cases, the executing authority had not accurately drafted the consent and then needed to redraft the consent, indicating the correct offences and/or the correct date.

- **Conditional consent:** In some cases, the executing authority was only willing to give its consent ‘*if the person was first sent back to the issuing Member State to be heard by the court*’ or ‘*if the issuing Member State would undertake that the requested person, if convicted, would not be imprisoned*’. In both cases, the issuing authorities refused to accept these conditions and, as a result, the persons could not be prosecuted for the other offences. In other cases, the executing authority sometimes requested that a new EAW be issued, but not all issuing authorities were willing to do so, and sometimes preferred to continue the trial without prosecuting the additional offences.

## VIII. SIMULTANEOUS EXECUTION OF EAWs IN MULTILATERAL CASES

In addition to the large amount of cases in which Eurojust intervened to remedy *ex post* problems with EAWs in a bilateral context (*see supra* II to VII), Eurojust also intervened, regularly, in more complex multilateral cases in which its primary role was to ensure the coordination of the simultaneous execution of EAWs in different Member States and to anticipate any potential problems. The execution of the EAWs was often part of a bigger operation in which the execution of EAWs went hand in hand with the execution of MLA requests (e.g. house searches, telephone intercepts, freezing measures) and the action was coordinated via coordination meetings and/or a coordination centre. In Level II meetings, preparatory steps were often taken *ex ante* to ensure that the EAWs fulfilled all legal requirements so that the simultaneous actions in the different Member States would not be jeopardised. In several cases, Eurojust helped to double-check or complete - at the last-minute - certain information from the EAWs, such as personal data of the suspects, spelling of names, charges not quoted in the EAW, place and time that offence took place, and/or date of birth. In many cases, Eurojust also provided urgent translation.

## IX. EXTRADITION OR SURRENDER: FIRST APPLICATION OF *PETRUHHIN* CASE LAW

In the aftermath of the Court of Justice’s *Petruhhin* judgement, Eurojust was requested to assist in a few cases in which Member States, which had been requested by a third State to extradite an EU citizen, consulted the requested person’s Member State to verify whether the other Member State would prefer that the requested person was surrendered to them rather than extradited to a third State. In this consultation process, Eurojust’s role consisted in passing the relevant information between the authorities, in addition to the regular channel of communication that was also activated, and in assisting national authorities in the clarification of some questions in relation to the judgement. In this regard, Eurojust foresees continuing to play an important role in assisting the national authorities, particularly by: i) identifying in a fast and efficient way the competent authority in other Member States to receive the requested information; ii) enabling the correct and fast transmission of the information between Member States and third States; and iii) ensuring that decision-making stays at judicial level, by assessing jurisdiction in concrete cases, despite the fact that the acts occurred in another country.

## X. GENERAL ISSUES RELATED TO THE APPLICATION OF THE EAW

The College of Eurojust has also dealt with more general issues related to the application of the EAW. The general issues identified below have been dealt with in the period 2014-2016:

- **The implementation and use of temporary surrender** (Article 24(2) EAW FD), both from the perspective of the issuing and the executing Member States – The IE Desk opened this topic and Eurojust gathered and compiled information on the national legislation of 15 Member States (AT, HR, CZ, FI, DE, HU, LT, MT, NL, PT, RO, SK, SI, SE, UK).
- **The consequences of the non-removal of an EAW warrant from SIS II and INTERPOL databases** – The HU Desk opened this topic and Eurojust gathered and compiled information from 23 Member States (AT, BE, BG, HR, CZ, EE, FI, FR, DE, HU, IE, IT, LV, LT, MT, NL, PL, PT, RO, SK, SI, SE, UK) to compile legal solutions existing in the Member States for a scenario in which a person subject to a European or an international arrest warrant, was, in the meantime, finally acquitted or convicted in a Member State. The information gathered from the Member States related, particularly, to the the following questions: (i) who - an authority or the defendant - should send the judgement or the inclusion of a flag and to which authority and (ii) whether other solutions should exist in the Member States for preventing and/or eliminating violations of the *ne bis in idem* principle.
- **The application of the speciality rule in the context of a transfer of a prisoner who had first been surrendered on the basis of an EAW for prosecution and was then transferred back to his country of origin for serving the remaining part of the sentence** – The LT Desk opened this topic, and Eurojust compiled information from nine Member States (BE, FI, DE, HU, NL, PT, RO, SK, SE). The replies address, *inter alia*, the legal regimes in the Member States under the 1983 Convention on the Transfer of Sentenced Persons and the 2008/909/JHA FD.
- **The implementation of Article 8(c) and (f) EAW FD on the content of the EAW** – the UK Desk opened the topic and Eurojust compiled information from 16 Member States (AT, BG, HR, CZ, EE, FI, DE, HU, IE, IT, LV, LT, PL, PT, SK, ES). The information essentially related to the following questions: (i) what type of judicial decision could satisfy the legal basis of the EAW; and (ii) must an EAW include information additional to evidence of an enforceable judgement?
- **The implementation and use of Articles 18 (temporary transfer of the requested person pending the decision) and 19 EAW FD (hearing of the requested person pending the decision)** – the UK Desk opened the topic and Eurojust compiled information from 14 Member States (AT, BE, BG, CZ, DK, EE, FI, DE, HU, IT, PL, PT, SK, SE).

## XI. CONCLUSION

Over the past three years, Eurojust has provided valuable assistance in EAW-related issues in **complex multilateral cases**, and also provided support in a considerable number of **bilateral cases**. **Language problems, differences in legal systems**, often in combination with the **urgent** nature of the request, were some of the main reasons why direct contact among judicial authorities failed. Moreover, in several cases, different issues were present at the same time and the challenge for Eurojust was to find a solution for each of them, many of these within tight deadlines. Often, Eurojust managed to successfully assist the national authorities in obtaining the requested reply and in sending it by the deadline. However, in some cases, the requested information arrived too late and the requested person was released and disappeared before a decision could be taken.

A recurring topic in Eurojust's casework was **requests for additional information**, covering a wide variety of topics discussed throughout this Report. Some of the Eurojust cases reveal that, thanks to such requests, inaccurately drafted EAWs could be rectified or completed and, occasionally, the surrender of the wrong person could be prevented. However, in other cases, the requests for additional information seemed to constitute unjustified obstacles to a smooth surrender procedure, particularly if executing Member States were requesting, on the basis of their national legislation, information that does not fall within the scope of the EAW FD.

Cases concerning **grounds for non-recognition** also required some follow-up, clarification and assistance from Eurojust. While - in most cases - the application of these grounds seemed straightforward, and in line with the EAW FD, a few cases involved executing authorities invoking grounds for non-recognition in situations that seemed to go beyond what was foreseen in the EAW FD (e.g. the ground for 'ongoing prosecution for the same acts in the executing Member State' was sometimes applied vis-à-vis own nationals while in fact no procedure was 'ongoing'; and the application of the 'dual criminality' ground was occasionally raised in the context of a list offence, namely 'participation in a criminal organisation'). Eurojust's role was often crucial in gathering the relevant information to make the necessary assessment in relation to the *ne bis in idem* ground.

The application of the three categories of **guarantees** - life sentences, *in absentia* judgements and return of nationals/residents - raised some questions. Eurojust assisted with the clarification of different issues, such as the conditions under which the person had been notified about his trial, whether he had been represented by a lawyer or how certain aspects were regulated in national legislation. Eurojust also noted that differences in national legislation could, on some occasions, be solved after clarification was given of how the rules were applied in practice (e.g. rules on life sentences), but could, on other occasions, remain difficult to resolve (e.g. the fact that a life sentence imposed in the executing Member State would not be absorbed by or included in the sanction to be imposed in the issuing Member State).

The application of the **speciality rule** turned out to be rather cumbersome in some cases for different reasons. Inaccurate drafting by the issuing authority or inattentive reading by the executing authority was, generally, resolved easily. More complicated were the cases in which executing authorities imposed additional national conditions that could often not be met by the issuing authorities.

Eurojust also assisted national authorities with the impact and follow-up of some important **CJEU rulings**, such as the *Aranyosi and Căldăraru* and the *Petruhhin* judgements.

Eurojust continued to assist national authorities in relation to **competing EAWs (Article 16 EAW)**, but also noted that decisions on subsequent surrender in the context of Article 16 EAW FD could not always be taken for granted in light of national EAW legislation.

Eurojust followed up on Member States' **notifications of breaches of time limits (Article 17 EAW FD)**, but believes that, for strategic purposes, further efforts can and should be made to get a more complete picture of the actual number of cases in which time limits have been breached, and also the exact reasons for the time breaches.

Finally, Eurojust became aware of problems with the **actual surrender**. Differences in national legislation with regard to persons being released on bail or under a regime of conditional bail complicated the actual surrender of the person in a number of cases, creating frustration among practitioners due to wasted resources as well as occasionally resulting in the requested person becoming a fugitive.

