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NOTE

From: Presidency
To: CATS
Subject: 9th round of mutual evaluations - Choice of the topic

The eight round of mutual evaluations, dedicated to the practical implementation and operation of European policies on the prevention and combating environmental crime, is well underway. Since it started in September 2017, 21 Member States have been evaluated, and so far 12 reports have been adopted. The last evaluation visit is foreseen to take place in February 2019, which means that the final report of the eight round of mutual evaluations could be adopted in mid-2019. Based on the above timeline, the first evaluation visits of the ninth round of mutual evaluations could take place in September 2019.

According to Article 2 of Joint Action 97/827/JHA¹, adopted by the Council on 5 December 1997, the Presidency shall propose to delegations for approval a "*specific subject of the evaluation as well as the order in which Member States are to be evaluated*".

¹ Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime (OJ L 344, 15.12.1997, p. 7).

Taking into account the preparatory work to be carried out with a view to the next evaluation round, in particular the choice of the subject of the evaluation, the elaboration and adoption of the questionnaire and the definition of the order of the visits to the Member States, the Presidency believes it is time to decide on the topic of the ninth round of mutual evaluations.

Following the discussions at CATS and at ministerial level, including at the JHA Council on 11-12 October 2018, which highlighted the importance of improving mutual recognition of judicial decisions and judgements with a view to enhancing mutual trust within the Area of Freedom, Security and Justice, the Presidency proposes to focus the next mutual evaluation round on certain aspects of mutual recognition.

In particular, the Presidency proposes that the ninth mutual evaluation round could cover certain aspects of the practical application of Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (EAW), of Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union ('Custodial sentences') and of Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO).

Though serving a different purpose, these three instruments have common features (direct contacts between judicial authorities, limited but similar grounds for non-recognition, time limits for execution, etc.) and they are interlinked, both as regards prosecution (EAW-EIO) and as regards the execution of sentences (EAW-Custodial sentences). It is therefore advisable examining these three instruments together.

As regards the EAW, the evaluation could include issues identified in the 4th mutual evaluation round (2007-2009) that still remain problematic, such as the issue of the proportionality², which has also been explicitly referred to by the Ministers during the discussion on mutual recognition at the JHA Council on 11-12 October 2018 as an important outstanding issue in the application of the EAW. The evaluation could also address further obstacles and challenges that have arisen since the 4th mutual evaluation round, especially those identified by practitioners in the light of recent case-law of the Court of Justice of the EU (CJEU).

² 8302/4/09 REV 4, point 3.9

As to the latter, one could think of the grounds for non-recognition relating to the risk of infringement of fundamental rights, notably because of detention conditions ("Aranyosi"³ and "Căldăraru"⁴ cases), and the issue relating to an extradition request from a third country regarding a national of another Member State ("Petruhhin"⁵ and "Pisciotti"⁶ cases), and the independence of the issuing Member State's judiciary⁷.

As regards the Framework Decision on the "Custodial sentences", the evaluation could address the practical application of the provisions of this instrument, including issues that relate to the competent authorities and early conditional release, as well as to forwarding a judgment and a certificate timely when the ground for non-recognition referred to in Article 4(6) of the Framework Decision on the EAW is invoked, or when Article 5(3) of that instrument is applied. The practical application of the FD in the light of recent case-law of the CJEU, such as the judgment in the Popławski case⁸, could also be examined.

The EIO Directive is a relatively new instrument, but it seems appropriate to evaluate already at this stage - meaning as from September 2019 - the practical application of some aspects of this instrument that are closely related to the FD EAW and the FD custodial sentences. The evaluation could in particular address the interaction between the EIO and the EAW in the light of the proportionality principle (as referred to in recitals 25 and 26 of Directive 2014/41/EU), taking into account that the EIO can in certain cases be an effective alternative measure to the EAW (e.g. for the hearing of a suspect or accused person).

As regards the interaction between the EIO and the FD Custodial sentences, the evaluation could e.g. assess the practical application of Articles 22 and 23 of Directive 2014/41/EU, relating to the temporary transfer to the issuing and executing States, respectively, of persons held in custody for the purpose of carrying out an investigative measure. The application of the grounds for non-recognition, which are broadly the same in the three mutual recognition instruments, could also be evaluated with particular emphasis on the fundamental rights based grounds for refusal in the EIO Directive.

³ Case C-404/15

⁴ Case C-659/15

⁵ Case C-182/15

⁶ Case C-191/16

⁷ Case C-216/18

⁸ Case C-579/15

Covering the EAW, Custodial sentences and the EIO in the context of the 9th evaluation round would contribute to ensure a more efficient and coherent overall application of the principle of mutual recognition by the competent authorities of the Member States in cross-border cases at all stages of the criminal proceedings and also help future discussions on fundamental rights based grounds for refusals.

A mutual evaluation round on such topics, based on the peer review approach, could provide an added value by offering the opportunity, with the on-spot visits, to consider not only the legal issues but also relevant practical and operational aspects linked to the implementation of these instruments by practitioners in the context of criminal proceedings. This would allow to identify both shortcomings and areas for improvement, as well as best practices to be shared among the Member States, thus contributing to a better functioning of cross border judicial cooperation in criminal matters and to enhancing mutual trust.

Following last CATS meeting on 18 September 2018, where the Presidency announced its proposal regarding the choice of mutual recognition as the topic for the ninth mutual evaluation round, only two delegations submitted suggestions for alternative topics, while it seems that they could at the same time agree with the proposal of the Presidency.

This being, any Member State that still wishes to submit comments concerning this Presidency's proposal is invited to do so **by 12 November 2018**, by sending them to the Presidency (wolfgang.pekel@bmvr.dj.gv.at) and to the General Secretariat of the Council (secretariat.mutual-evaluation@consilium.europa.eu and criminal.law@consilium.europa.eu).

In the light of the above, at the next CATS meeting on 21 November 2018, the Presidency intends to have a discussion and take a decision on the topic of the ninth mutual evaluation round. The precise mandate and the detailed content of the evaluations would have to be more clearly defined at a later stage following further discussions and the adoption of the questionnaire. Any suggestions from delegations in this regard are already welcome and could be sent to the same addresses indicated above.