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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW

Delegations will find attached extracts from Conclusions of Plenary meetings of the European Judicial Network (EJN) in respect of case law relating to the European Arrest Warrant:

ANNEX I: extract from the Conclusions of the 48th plenary meeting of EJN (Malta, June 2017);

ANNEX II: extract from the Conclusions of the 49th plenary meeting of EJN (Tallinn, November 2017).

ANNEX I

Extract from the Conclusions of the 48th Plenary meeting of EJN

(Malta, June 2017)

Practical aspects regarding the relation between extradition and the European Arrest Warrant surrender procedures raised by the judgment of the Court of Justice of the European Union in Case C-182/15 Petruhhin

Background

On 6 September 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-182/15 Petruhhin. This judgment has a significant impact on the cooperation between the Member States and third countries on extradition matters, namely on the execution of a request for extradition presented by a third country to a Member State of the European Union against a national of another EU Member State.

Practitioners from EU and third countries discussed the different interpretations and shared their experiences and the measures taken in a number of cases affected by the Petruhhin Judgment. During the discussions, it became evident that many practical points needed to be considered, since the CJEU had not provided detailed information on procedural measures.

Conclusions - EAW

a. EAW Priority

Within the scope of the Petruhhin case, the CJEU clearly indicates that Member States should provide precedence to the European Arrest Warrant (EAW) in the case of a competing EAW and an extradition request from a third state. However, as prescribed in Article 16 (3) of Council Framework Decision 2002/584/JHA on the EAW, when taking the decision, all circumstances should be considered and in particular those mentioned in Article 16 (1), such as the relative seriousness and place of the offences and those mentioned in the applicable conventions.

Therefore, the majority of the participants stated that the decision on which request should take precedence cannot be automatic and that competent authorities must assess each case individually.

b. Scope of application of the Petruhhin judgment

Several circumstances were observed with regard to the application of the Petruhhin judgment. Many countries are traditionally not extraditing their own nationals. There are only a few EU Member States that allow for the extradition of their own nationals and different considerations should be taken when specific treaties, bilateral or multilateral may state otherwise. Under this umbrella of possibilities, no general scope was found and a case-by-case approach should be followed.

To determine if the principles of the Petruhhin judgment are also applicable for extradition concerning the enforcement of a custodial sentence, Finland has requested for a preliminary ruling of the CJEU in Case C-247/17 - Oikeusministeriö v Denis Raugeviciu.

c. Obligation to inform the Member State of nationality

Participants remarked that the EU Member States, as a consequence of the Petruhhin judgment, have an obligation to inform the Member State of which the requested person is a national (Member State of nationality), about the extradition request, to give that Member State the opportunity to issue a EAW. However, in the view of the participants, the objective of providing the information is first and foremost to extend the opportunity to issue a EAW in case there is a pending investigation on the person in question and not to initiate a new investigation if the authorities were not previously aware of the alleged crime or not in possession of the necessary evidence at the time the information is received. As far as the participants were aware, in those cases where information has been provided, Member States have not been in the position to issue an EAW.

d. Extent of the information provided to the Member State of nationality

To fulfil the obligation to inform the Member State of nationality, participants expressed that it would be sufficient to provide the same type of information that is usually contained in a SIS alert. In certain cases the Member States consult the country requesting the extradition to ensure that they are in agreement with providing further information to the Member State of nationality.

e. Recipient of the information in the Member State of nationality

It was concluded that the information should normally be provided to the Central Authority in the Member State of nationality. The EJN should be used for the facilitation of the communication. Communication via email should be sufficient, but it was concluded that Member States could use the channel they find most effective.

f. Time Limits

Participants agreed that there should be a reasonable deadline provided to the Member State of nationality to allow for an assessment of the possibility of issuing an EAW, before the request for extradition would be further processed. Practice showed different approaches, but the participants agreed that a period of 10 days, with the possibility to extend it under certain circumstances, would be sufficient.

g. Confidentiality

According to most of the participants, extradition cases do not require confidentiality by default, however there could be circumstances where the investigation could be jeopardised, if information would be made public. Therefore, the matter of confidentiality has to be solved on a case-by-case basis.

h. Role of the EJN

According to the participants, the EJN Contact Points should be used as facilitators of the communication and to ensure that all parties are updated on the state of the requests. There is no need for a new structure to handle the specific requirements of the Petruhhin judgment, since the EJN Contact Points are already in place and have the task of providing legal and practical information to facilitate judicial cooperation in general, regardless of what kind of assistance is needed

There is a need to continue the discussions on the Petruhhin judgment, in following EJN meetings. The experience, practical and legal problems that are gathered in the Member States should continue to be shared within the EJN to enable all Member States to handle effectively cases that are affected by this judgment.

ANNEX II

Extract from the Conclusions of the 49th Plenary meeting of EJN

(Tallinn, November 2017)

Workshop I - EAW and detention conditions: consequences of the CJEU Decision on

Pál Aranyosi (C‑404/15) and Robert Căldăraru (C‑659/15 PPU) cases

Background

Following the examination of the preliminary questions posed by the *Aranyosi and Căldăraru cases,* the CJEU held that the execution of EAWs must be deferred or eventually ended if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued.

This judgment has a significant impact on the surrendering of persons under the European Arrest Warrant procedures. As a consequence, the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. The CJEU added that if the existence of a risk of inhuman or degrading treatment cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be ended.

Practitioners from EU and third countries discussed the different questions and shared their experiences and the measures taken in several cases affected by the Aranyosi/ Căldăraru Judgment. Many practical points were considered since the decision of the CJEU had opened many gaps in the EAW procedure.

Conclusions

General Conclusions on the consequences for the EAW procedure

The practical significance of the *Aranyosi and Căldăraru* decision has opened several discussions among practitioners. The EJN Contact Points remarked that a gap has been created between respecting the CJEU and ECHR and the principle of Mutual Recognition and Mutual Trust. In several cases the EAW procedures are being ended without a final surrender (impunity!). Furthermore, in some cases National Courts are asking for detention conditions that not even their own state is able to provide.

Surrender within the EU has almost become more challenging than extradition between the EU and third countries. Paradoxically, third countries extradite to EU Member States where the detention conditions are questioned within the EU. And in cases of extradition to a third country, Member States seem to be less rigid than within the EU regarding the detention conditions in third countries.

1. Executing Member States

a. **Assessing systemic and generic risks:** Judicial authorities base their decision to request additional information on detention conditions on the ECHR and national case law, CPT reports, NGO reports, proof/ complaints presented by the defence attorneys and even on complaints received by previously transferred persons. On the other hand, internet and newspapers are not considered reliable sources. Although under the principal of Mutual Recognition the EJN Contact Points underlined that the obligation to request additional information does not become a permanent part of the process, a comprehensive database describing the current information per country and judgments would be useful to gather the sources available in one place. However, this database should remain updated, specific and not undermine mutual trust.

b. **Template for additional information on detention conditions**: The type of information required from the Issuing Member State is decided on a case by case basis. It was concluded that to provide executing Member States with a template describing multiple options or a model questionnaire would not be advisable. These kinds of documents could invite the judiciary to enquire more information than necessary from the issuing authorities. Member States should be proportionate in their requests and not be tempted to request more information than what is strictly necessary to ensure that the person to be surrendered would not be at risk of inhuman or degrading treatment.

2. Issuing Member States

a. Information on detention conditions: Upon the receipt of a request for additional information under article 15.2 of the EAW FD, the EJN Contact Points confirmed that a practice has been established to provide standardised information regarding the detention conditions of their country. This allows the executing authority to fulfil the timelines and manage the requests. However, it was discussed among the experts that it would be preferable to receive tailored replies since providing information that is not required could lead to raising additional questions in the executing Member State.

3. Alternatives to the execution of the EAW

a. **Selected detention facilities:** It was discussed if identifying and only providing the option to surrender the persons to several "luxury" detention facilities could help to solve the problem. This would be in line with the detention conditions required for the surrender and could be an intermediate alternative solution, until improvements can be done in all detention centres. Participants indicated though that placing detainees in selected facilities creates a new set of problems, e.g. in generating inequality and rewarding persons who have fled abroad with a better treatment.

b. **Transfer of proceedings:** EJN Contact Points indicated that it is difficult to apply transfer of proceedings, even if by national legislation they would be legally bound to investigate and prosecute the person, since often jurisdiction is missing or on occasions obtaining the necessary evidence is problematic followed by discontinuation and acquittal

c. **Transfer of sentenced persons**: Practitioners explained that in practice the Member State involved do not send a request for transferring the sentenced person. One of the reasons is the proximity to the place of residence and family, which could affect the reintegration to the society.

4. Impunity because of the Judgments

The judgment states that if the existence of the risk of inhuman or degrading treatment cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be ended. The participants agreed that in practice this has resulted in impunity. In several cases, National Courts are refusing the requests for surrender and releasing the persons involved. Consequently, suspects are not being brought to justice or convicted persons do not serve their sentence, putting public security at risk.

Another consequence relates to the victims of crime. In case of impunity, victims are prevented from obtaining justice and compensation for the crimes committed against them.

5. The role of the EJN

a. **Facilitating exchange of information**: The EJN has been identified as a key element for facilitating the communication between the competent authorities. According to the EJN Contact Points they have assisted in several cases and they did not encounter difficulties establishing a dialogue with the other Member States and obtaining the requested information.

The development of a new network dedicated to the exchange of information on detention conditions for the EAW procedure did not find support. Instead it was recommended that EJN Contact Points - that are specialists in detention conditions- are indicated in the EJN website as such, for practitioners to identify the most suitable contact.

b. **Information on the EJN Website:** Participants emphasised that it would be useful to gather national case law on this topic and to present it on the EJN website. In this way, and by providing a summary in English, practitioners would be able to get a better picture on the development in the other Member States. In case of need further information could be requested from the EJN Contact Points.

6. The role of Eurojust

a. **Report on Article 17 (7) of the EAW FD:** In case there is a delay on the execution of an EAW, Member States are obliged to inform Eurojust about it and the reasons for the delay. Eurojust will distribute a new template soon with the aim of streamlining the information that the Member States should send to Eurojust. The EJN Contact Points would welcome information on the amount of cases of delays reported by the Member States to Eurojust to further understand the extent of the problem with detention conditions and thereby the effectiveness of the EAW.

b. **Coordination Meetings**: Eurojust offers the opportunity to discuss and assist in issues related to detention conditions such as the need for additional info and reaching solutions for authorities through coordination meetings.

7. Suggestions for the European Commission and final remarks

The EJN Contact Points welcomed an evaluation by the European Commission of the implementation of the EAW FD in due time. They also suggested that it would be advisable to facilitate awareness raising among the CJEU and ECHR as well as the national courts about the different issues affecting international judicial cooperation in criminal matters and the practical consequences of the judgments.

There was a general agreement that the efficiency of the EAW and as a consequence public security in the Member States will continue to be at risk unless the detention conditions are brought to an appropriate level in all Member States. In this regard the funding possibilities offered by the European Commission to accelerate the restorative process of prisons and detention centres should be further explored to solve a swift growing problem of impunity that effects the security of the EU citizens.

Workshop II - EAW and time limits for surrender:

executing an EAW in line with Articles 15(1) and 23 of the EAW Framework Decision

in light of the CJEU Decision on Vilkas (C-640/15)

Background

On 25 January 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-640/16 Vilkas. The Court interpreted Articles 15(1) and 23 of the EAW Framework Decision (EAW FD) and concluded that the authorities responsible for executing a EAW must, in the event of *force majeure* being established, set a third surrender date where the first two surrender attempts have failed on account of the resistance put up by the requested person. In its judgment, the CJEU clarifies the meaning of the concept "*force majeure*" ("circumstances beyond the control of the Member States concerned") in the context of the EAW FD, but underlines that it is for the national court to make the final assessment as to whether the circumstances in the case at hand constitute "*force majeure*" or not.

The CJEU concluded that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 have expired.

At the 49th Plenary meeting of the European Judicial Network, the EJN Contact Points discussed these matters and shared their experiences and the measures taken in a number of cases affected by the Vilkas Judgment. Several related practical points were considered.

Conclusions

1. Time limits and procedures for surrender of the person (Article 23 EAW FD)

According to the CJEU, Articles 15(1) and 23 must be interpreted as meaning that issuing and executing authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired, whereas the number of new surrender dates are not expressly limited where surrender has failed more than 10 days. Also, Article 15(1) of the EAW FD cannot be interpreted as meaning that, once the time-limits stipulated in Article 17 of the EAW FD have expired, the executing judicial authority is no longer able to adopt the decision on the execution of the EAW or that the executing Member State is no longer required to carry out the execution procedure in that regard.

The EJN Contact Points discussed national regulation in the Member States with regard to mandatory time limits for surrender of the person (Article 23 EAW FD). It turned out from the discussion that there are Member States where according to national law person will be surrendered within 10 days after final decision on the execution of the EAW and there is possibility to extend time limit to surrender (e.g. due to force majeure). On the other hand, in some Member States where there are strict time limits in the national law for the total duration of detention in relation to execution of the EAW (for taking a surrender decision and for actual surrender of the person), the extension of the time limit to surrender a person after the deadline to release the person from detention has reached, might not be possible.

To acknowledge these differences, a compilation of national legislation transposing Articles 17 and 23 of the EAW FD was seen by the EJN Contact Points as a potentially useful source of information. The compilation could include both the time limits for the decision on surrender as well as time limits for the actual surrender of the person (*fiches estoniennes,* which could also be integrated in the existing tools*).*

2. Detention and release of the requested person

CJEU is referring that the person can be kept in detention during pending execution of an EAW only if the duration of the detention is not excessive in light of Article 6 Charter (and not merely upon expiry of the time limits as stated in Article 23 (5)).

With regard to the duration of detention concerning execution of the EAW, there are Member States who have strict time limits for the total duration of detention and others with no maximum time limits for detention. Thus, time limits for the detention vary across Member States. In Member States where strict time limits for detention apply, the person has to be released after the deadline provided for in the national law is reached. Such deadlines may vary between 60 days and 9 months as revealed in the discussions between the EJN Contact Points.

In Member States where there is no maximum time limit for detention prescribed in national law, the person can be held in custody for an unlimited period until the surrender has taken place

3. Postponement of the surrender due to "circumstances beyond the control of any of the Member States" (*force majeure)* (Art 23(3) EAW FD)

The CJEU states that there is a divergence between the various language versions of Article 23(3), which provides for that a new surrender date may be agreed upon between the issuing and executing Member State when "circumstances beyond the control of any of the Member States" i.e. *force majeure* occurs in view of the surrender.

The EJN Contact Points discussed references to *force majeure/* any other circumstances in the national legislation of their Member States as ground for not carrying out the actual surrender within the time limit. Most Member States have implemented Art 23(3) into national law as circumstances beyond the control of any of the Member States". Thus, these circumstances are in practice a matter of case by case interpretation, which can occasionally be broader than the term *force majeure* would imply. However, there was a common agreement among the EJN Contact Points that the interpretation should be strict.

Several examples of possible "circumstances beyond the control of any of the Member States" were discussed. Contact Points had different opinions if sickness of the person concerned can be viewed as such, or self-destructive behaviour of the person concerned or issues with the flight (delay or cancellation). Eruption of a volcano, on the other hand, was commonly agreed to be a textbook example of *force majeure.*

The opportunity to collect important examples of national case law regarding the notion „*force majeure*" was raised in the discussions as one way of reaching a common understanding. It was however agreed that for several reasons (such as the issue of translation of national case law) the need to implement this suggestion should be first analysed further.

4. Best Practices

The EJN Contact Points reflected on possible best practices between issuing and executing Member States with regard to surrendering the person concerned, which aim at an efficient cooperation between Member States.

Several Member States highlighted already existing good cooperation with neighbouring Member State(s) with regard to the actual surrender.

It was mentioned as a problem by some of the Member States that while executing an EAW the authorities encountered a situation where the issuing Member State was not able or willing to collect the requested person on time, which had already been agreed. This situation could result in the requested person being released from detention, either because force majeure could not be established or the executing Member States might apply strict deadlines on the length of detention.

Key to solve these situations would be efficient communication between the authorities of the executing and issuing Member States. Thus, if the issuing Member State has problems with collecting the person concerned, it should inform the executing Member State as soon as possible. In such a situation, the EJN Contact Points have an important role to play in facilitating the communication.

Exceptionally, the executing Member State might provide assistance with the actual surrender, in particularly pressing situations, e.g. where the release of the person would be unacceptable for the society and justice.

5. Role for the EJN Contact Points and the EJN Website

The major role for the EJN Contact Points in relation to the situations in the Vilkas judgment, was agreed to be consultation and communication between the issuing and executing Member State. The EJN is available to assist in case of delay from the side of the issuing Member State or with any other issue that may cause unnecessary delays of the surrender.

The EJN Contact Points confirmed that there is a constant need for raising awareness of the EJN; in many Member States practitioners still lack sufficient knowledge about the EJN. This issue should be tackled – mainly internally – in order to assure that practitioners across EU are aware of the possibilities and the channels offered to them by the EJN.

6. EJN Website

The EJN Contact Points underlined that if a compilation of national legislation implementing Articles 17 and 23 of the EAW FD was undertaken, such a compilation should be uploaded and information made available on the EJN website.

And should national case law regarding the notion of „*force majeure*“ be collected, this information should also be made available on the EJN website.