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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
On: 21 May 2019
To: Delegations
Subject: Summary of discussions COPEN meeting

1. Adoption of the agenda

Agenda was adopted as set out in CM 2854/2/19 REV 2. However, it was decided to discuss point 3 prior to point 2.

2. Conclusions of the AG in joined cases C-508/18 and C-82/19 PPU, regarding the question of whether a public prosecutor's office falls within the notion of 'judicial authority'

The Presidency presented its paper (9385/19). It stressed the potential impact of the CJEU judgment, expected for 27 May 2019, on the functioning of EAW surrender procedures as provided for in the Council Framework Decision 2002/584/JHA.

According to the Presidency, the implications of the judgment would be different, depending on whether the Court followed entirely¹ or partially² the conclusions of the Advocate General.

The Presidency invited the delegations to have an exchange of views on the measures their Member States would have to adopt, both at legislative and practical level, if the CJEU followed, entirely or partially, the view of the Advocate General.

All Member States that intervened, especially those in which public prosecutors are issuing authorities of EAW's (either during the pre-trial stage or for the enforcement of a final sentence) expressed serious concerns regarding the effects of a judgment which would state that a public prosecutor/public prosecutor's office would not be a judicial authority for the purpose of Council Framework Decision 2002/584/JHA and, consequently, would not be able to issue EAW's in the future.

It was observed that while 'only' 14 Member States (AT, BE, BG, DE, DK, EE, FR, HR, IT, LT, LV, NL, PT, SE) have designated public prosecutors/public prosecutor's offices as issuing authorities, all Member States would be affected when acting as executing Member States.

¹ The Court would find that all public prosecutors are not considered to be a 'judicial authority'.

² The Court would find that only the public prosecutors which could receive instructions from the executive do not fall under the notion of 'judicial authority'.

A majority of the Member States where prosecutors can issue EAW's considered that a judgment following entirely the conclusions of the Advocate General would require amendment of their national legislation.

If the judgment were to follow only partially the opinion of the Advocate General, the fear was expressed that such a judgment might lead to legal uncertainty and result in a lot of new preliminary ruling referrals to the Court on individual cases.

Member States in which only judges/investigative judges may issue EAW's (including CY, PL, SK, UK) expressed concerns regarding the impact on the execution of EAW's received from Member States in which public prosecutors are issuing authorities. One issue of concern was what could be done as regards persons held in custody on the basis of an EAW that would be 'invalid' following the judgment of the CJEU.

The Council Legal Service stressed the point that it was premature to comment at this stage on this matter. However, it stated that if the judgment were to rule that a public prosecutor was not a judicial authority within the meaning of Council Framework Decision 2002/584/JHA, this would not have a direct / immediate effect on other legal instruments giving effect to the principle of mutual recognition.

It was concluded that this matter would have to be followed closely by the COPEN Working Party and, if necessary, that a new discussion would have to be held once the judgment in joined cases C-508/18 and C-82/19 PPU has been delivered.

3. EAW Experts' Meeting, Brussels, 7 May 2019

The Commission presented the outcome of the EAW Experts' meeting it held in Brussels on 7 May 2019.

The Commission highlighted the point that the event had benefited from the presence of a large number of practitioners, judges, prosecutors and representatives from central authorities, and that the event had focused on the following topics: *in absentia* judgments, application of Article 4(6) of Council Framework Decision 2002/584/JHA, and the EAW and fundamental rights.

DE and RO representatives spoke about experiences as executing and issuing States, while the FI representative presented the experience of her country regarding grounds of refusal in general.

The Fundamental Rights Agency (FRA) gave a short presentation of their project *Criminal Detention in the EU-Conditions and monitoring*, which would entail the creation of a database (register) containing relevant information on prison conditions in the Member States. The experts that intervened supported in principle the creation of such a database, but emphasised the need to keep the database regularly updated.

The update of the Handbook on how to issue and execute a European arrest warrant was the last topic on the agenda of the event organised by the Commission. The point was made that the Member States have the opportunity to submit additional written comments concerning possible ways in which to improve the handbook to the Commission (JUST-CRIMINAL-JUSTICE@ec.europa.eu) by 30 June 2019. The revision of the handbook will take place by the end of 2019.

4. EU cooperation in criminal matters and EAW statistics

The Commission presented its paper on the collection of statistics concerning the EAW (9195/19). The Commission stressed the fact that having statistical data on the EAW was very important, and that the aim of the current exercise was to improve the collection of such data.

Member States were asked if it would be useful to make clearer/additional instructions on how to fill in the questionnaire as set out in 11356/13, and/or whether it would be useful to revise the questions of that questionnaire or add new questions.

The Commission stated that there were still 12 Member States (AT, BE, BG, CY, EE, ES, FR, HR, IT, MT, NL, UK) that had not yet provided statistical data on the EAW for the year 2018 and invited them to provide the data as soon as possible.

In response, and on a general note, some Member States (NL, SE) highlighted the point that the collection of statistical data should be undertaken to serve a useful purpose.

As regards the need for clearer/additional instructions, most of the intervening delegations stated that the existing instructions were clear enough and there would be no need for additional instructions.

As regards the question whether it would be useful to amend the questions of the questionnaire and/or add new questions, various delegations (DE, LT, PT, UK) expressed the view that the existing questions were sufficient. Caution was expressed on making changes to the questionnaire. Some Member States (CZ, LT) were opposed, as a matter of principle, to the idea of making changes to the questionnaire, as these would require an investment in adapting their existing CMSs/software. Nevertheless, certain Member States were open to add new questions, such as a question about the number of EAWs refused because of the application of the FD 909 (FR) or a question about the number of EAWs postponed due to prison conditions (HU).

The Presidency concluded that Member States could send written comments on the Commission's paper by 7 June 2019.

5. EU cooperation in criminal matters and other statistics

The Presidency presented its paper (9196/19), and invited the delegations to express their views on the possibility, opportunity and necessity of collecting statistics on the application of instruments of mutual recognition other than the FD EAW.

In general, the majority of the Member States that intervened expressed concerns with regard to the collection of additional statistical data, due to the difficulty of collecting such data. As was the case in the previous item, the question was put whether the collection of such data serves a useful purpose.

As regards the ways in which statistical data are collected, some Member States reported that they do not have an automated system available. Other Member States, however, mentioned that their case management systems could filter data based on type of cooperation, year and number of requests. The systems of some Member States could collect more detailed information, such as time for executing a request, how many requests have been executed or refused, and the type of instrument / type of offences. In order to obtain even more detailed statistical data, manual collection would be required.

Some Member States stated that the direct contact between judicial authorities based on mutual recognition instruments made it difficult to collect statistics.

The Commission reminded participants of the fact that the e-Evidence Digital Exchange System would become available as of October this year. This platform would be applicable to EIO and MLA, while other instruments would be included at a later stage. The platform would be able to generate statistics about the traffic data, taking into account confidentiality and security requirements.

The Presidency thanked the Commission for the good news as regards the launch of this new platform but pointed out that this would be only one of the possible channels of communication. The Presidency expressed the view that the platform should be used on a large scale by all competent authorities so as to ensure the effectiveness of the new platform. To this end, the Presidency invited the Commission and the Member States to take the necessary steps in order to make sure that all the competent authorities and central authorities from the Member States, as well as - subject to agreement of the respective Member States - the national desks at Eurojust and the contact points of the European Judicial Network, would have access to the new platform.

The Commission explained what would be provided by the platform and also invited the Member States to disseminate the information to their respective authorities.

Some Member States pointed out that there was a risk of duplication, since EU funding would be provided in parallel to other similar platforms – SIRIUS Project (lead by Europol) and e-MLA Project of INTERPOL.

6. Conflicts of jurisdiction and application of the *ne bis in idem* principle in practice

The Presidency presented its paper (9197/19) and invited the delegations to discuss the issues raised in that paper.

The Commission stressed the point that currently there were no mandatory EU criteria for the prevention and settlement of conflicts of jurisdiction, nor specific EU rules for transfer of proceedings. From this perspective, criminal law would lack behind civil law, where matters relating to jurisdiction have been regulated since 1968.

The Commission also recalled that some Member States have expressed the view in the past that there might be a need to harmonise at EU level the definition of the *ne bis in idem* principle, in the light of the jurisprudence of the CJEU and the ECHR.

Some Member States (CZ, DE, HR, IT) provided answers to the questions raised in the Presidency paper, and SE stated that it would send comments in writing.

Consultations under Framework Decision 2009/948/JHA on conflicts of jurisdiction were considered satisfactory by many speakers. Some Member States felt that such consultations were compulsory (DE). As for the methods to avoid conflicts of jurisdiction, direct consultations, spontaneous exchange of information, coordination meetings at Eurojust, and the use of the European Judicial Network (EJN) were mentioned. In addition, reference was made to the options as regards the transfer of proceedings under the 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, and to Article 21 of the 1959 Council of Europe Convention on mutual assistance in criminal matters.

As regards the criteria for choosing the jurisdiction, the preferred options are location of the suspect and location of the evidence or location where the offence is committed. Negative conflicts of jurisdiction are rather rare and are solved through direct consultation. One Member State mentioned the existence of a national register where the authorities have the obligations to check if the person is prosecuted or not at domestic level. This would preclude the creation of positive conflicts of jurisdiction in relation with another Member State.

On the application of the *non bis in idem principle*, all the respondent Member States stated that at national level the relevant jurisprudence of the Court of Justice of the European Union was well known and adequately applied by the judiciary.

Eurojust mentioned the important role played by this agency when dealing with conflicts of jurisdiction. In Eurojust's view, the most important contribution was consultation between Member States in the initial phases of the case, brought about through the Eurojust coordination meetings. Eurojust referred to the tendency to use JITs to create a criminal file in one of the Member States with the sole purpose of assisting another Member State involved in the investigation, but without the intention of continuing the investigation. Eurojust expressed the view that the interpretation of the principle of *ne bis in idem* as a grounds of refusal was very different in the Member States.

The Presidency took into account the fact that several delegations considered that there was not enough time to consult the practitioners and invited the delegations to present possible comments in writing by 7 June 2019.

7. Eurojust annual report 2018

Eurojust presented the Eurojust Annual Report for 2018. It focused on the innovations in the report, both as regards style and content, and highlighted the main activities undertaken by Eurojust during the reporting year.

The Commission and the Presidency praised the excellent work performed by Eurojust and stressed the need for the allocation of adequate resources to this agency to help it better carry out its tasks and accomplish its mission.

8. Debrief from the Commission on victims' rights policy

The Commission presented briefly the results of the meeting of the European Network of Victims' Rights held in Madrid on 6 May 2019. The presentations given in the meeting are available for interested delegations on the Network's website. The meeting addressed three key items: violence against women, application of EU rules on victims' rights in the light of data protection rules, and crimes and media exposure.

The Commission representative also spoke about the launch of the public procurement call for the EU Centre of Expertise for Victims of Terrorism. The Centre will become operational in the second half of 2019 and will provide training activities for national authorities responsible for implementation of the EU rules and for national support services and a hub/platform of expertise (including lists of practitioners dealing with victims of terrorism).

Finally, the Commission mentioned the publication of the FRA report on victims' rights on 25 April 2019 and invited Member States to read them.

9. AOB

There was no business under this item.
