

Brussels, 18 September 2023 (OR. en)

13059/23

COPEN 318 JAI 1166 EJN 13

# **NOTE**

From:	General Secretariat of the Council
To:	Delegations
Subject:	Conclusions of the 60th Plenary Meeting of the European Judicial Network (EJN) (Stockholm – 12 to 14 June 2023

Delegations will find in the Annex the above-mentioned document.





EJN/2023/8 16.06.2023

## **60<sup>TH</sup> PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK**

12-14 June 2023 STOCKHOLM, SWEDEN

#### **EJN CONCLUSIONS**

#### FREEZING AND CONFISCATION OF ASSETS

# **BACKGROUND INFORMATION**

## Legal basis

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of **freezing orders** and **confiscation orders** 

#### Introduction

The freezing and the confiscation of instrumentalities and proceeds of crime are among the most effective means of combatting crime. The Union is committed to ensuring more effective identification, confiscation and re-use of criminal assets in accordance with the Stockholm programme – an open and secure Europe serving and protecting the citizens. As crime is often transnational in nature, effective cross-border cooperation is essential in order to freeze and confiscate the instrumentalities and proceeds of crime.<sup>1</sup>

There have been legal instruments available for freezing orders since 2005 and for confiscation orders since 2008 through Council Framework Decisions 2003/577/JHA and 2006/783/JHA. However, the Commission later found that these instruments were not fully effective since they were not uniformly implemented and applied in the Member States. They have therefore been replaced by the Regulation (EU) 2018/1805 of the European parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (the Regulation) which came into force on 19 December 2020. Nota bene, the framework decisions are still applicable with regard to Denmark and Ireland.

The principle of mutual recognition is a cornerstone in judicial cooperation in criminal matters within the EU. It builds on the concept that the Member States have confidence in and rely on

 $<sup>^1</sup>$  Recital 3 and 4, Regulation (EU) 2018/1805 of the European parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders





the validity of each other's decisions to always be recognised and executed in compliance with the principles of legality, subsidiarity and proportionality. With a new instrument for judicial cooperation which is introduced as an EU regulation, is directly applicable and needs no implementation in the Member States, one would think the cooperation would immediately be smooth. However, with a new instrument for cooperation there are always initial challenges when applying the instrument.

The aim of the discussion during this workshop was to find out how to improve cooperation and also to identify the most current challenges when issuing and executing freezing and confiscation orders.

## **CONCLUSIONS**

## 1. NON-EXECUTION OF ORDERS AND IDENTIFICATION OF ASSETS

Before deciding not to recognise or execute a freezing or confiscation order on the basis of any ground for non-recognition or non-execution, the executing authority should consult the issuing authority in order to obtain any necessary additional information (Recital 35).

An executing authority may consider a decision not to recognise a freezing or confiscation order because the property has disappeared, cannot be found in the location indicated in the freezing/confiscation certificate or because the location has not been indicated in a sufficient manner. However, should the executing authority subsequently locate the property, the freezing order may be executed without a new freezing certificate being transmitted provided that the freezing order is still valid (Article 13(4) and 22(4)).

The discussions indicated that, acting as executing authorities, most Member States are rather flexible and cooperative with their counterparts. Before making a decision on non-execution, the majority of the executing states would consult the issuing authority in order to get detailed information that would allow locating the property and executing the request. The same applies to requests with obvious mistakes and discrepancies between original orders/certificates and translations (e.g., misspelling; imprecise number of bank account that does not correspond to the IBAN standard format, etc.). It is considered the best and recommended practice for an executing authority to be proactive and as helpful as possible and to consult the issuing authority first instead of refusing execution of a request.

On the other hand, to save time and avoid possible delay in execution, it is **recommended** that the issuing authorities:

- 1) are precise in their requests, especially providing the assets description;
- 2) check the accuracy of the names, addresses and other information in both original documents and the translations (lack of language knowledge usually should not be an obstacle to revise the assets identifying information).

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When it comes to the need to locate the assets, the experience of the Contact Points differs from country to country, making it possible to divide them into two groups:

- executing authorities with the flexible approach that perform the actions to locate the assets, even when the information is not sufficient enough;
- 2. executing authorities that require as precise as possible identifying information.

There are various channels with tasks to trace and locate assets in other Member States, such as **Assets Recovery Offices (ARO)** and the **CARIN network.** Also additional **police channels can be used.** An additional advantage of these networks is that the operational language is English which can save time in cases of urgency. However, several participants pointed out that knowledge of the assistance these channels can provide is not high enough among practitioners. Close cooperation, as well as more training, presentations and other **awareness raising events** are required to make the best use of these networks. It would be advisable also to increase cooperation between the EJN on one hand, and ARO and the CARIN Network on the other.

Since the rules on freezing and confiscation differ a lot in the Member States it is advisable to always contact your counterpart in advance of issuing a freezing or confiscation order, or at least as soon as any question regarding the order arises. The EJN Contact Points could serve as a link between issuing and executing authorities to find out more information about the assets.

# 2. RESTITUTION

Recital 45 of the Regulation states that the victim's rights to compensation and restitution should not be prejudiced in cross-border cases. Rules for the disposal of frozen or confiscated property should give priority to the compensation of, and restitution of property to, victims. Rules for the restitution of frozen property to the victim are provided for in the Article 29.

Despite the rather clear regulation of Article 29, there are still many aspects that can raise issues in this regard, for example:

#### 1) restitution in the pre-trial stage

Overall, the victim's rights for the restitution should be a priority, even if assets initially have been frozen for another purpose. In most Member States it is possible to return the assets to a victim even before a final judgment, where **the ownership of the asset is not challenged.** 

# 2) compensation to the victims

Some countries cannot issue a freezing order for compensation, being limited to civil proceedings. Other countries can do that as long as the prosecutor is representing the victim's civil claim within the framework of the proceedings of the criminal case. On the other hand,

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compensation to the victims can be difficult because of civil law implications and the risk of liability of public authorities.

## 3) requests made by special (i.e. other that judicial) authorities

In some countries authorities other than a prosecutor or judge are competent to deal with confiscated assets in the post-trial phase. If the respective Member State has notified this authority as competent under the Regulation, its request can be executed in most Member States.

## 3. TRANSLATION AND URGENCY

When it comes to the urgency to freeze assets, every hour counts. A number of Member States accept the freezing and/or confiscation certificates only along with a translation into their national language which can cause delays in sending requests and increases the risks of assets disappearing or asset shifts. Depending on the language regime it can take several weeks to translate the certificate into the requested language. However, there might be alternative ways to communicate with the executing authority and to secure the assets:

- 1) to use direct/bilateral contacts with a view to agree that the executing state would exceptionally accept translation into English (or other language that is faster to translate);
- 2) to explore other means to freeze assets, e.g. to suspend bank transactions via FIU, or if it is in the executing state's interest they might be able to use national rules to freeze the assets e.g. according to anti-money laundering legislation (including administrative actions).

# 4. THE ROLE OF THE EJN

Regarding the Regulation, the <u>EJN website</u> contains declarations and notifications of the Member States regarding accepted languages, requirements to transmit the original freezing and/or confiscation orders (or certified copies) along with the certificates and competent authorities. Apart from that, the recently updated Fiches Belges tool contains short and concise information on the national regulation of freezing, restitution and confiscation in the EU Member States.

However practitioners using the Fiches Belges claim that in this format it is impossible to provide all the information regarding freezing and confiscation, so they usually turn to the Contact Points of the respective country for more information. Therefore, the EJN serves its purpose as a channel for the consultations and assistance between competent authorities.

As it was mentioned before, in addition, the EJN could enhance cooperation with ARO and the CARIN networks so practitioners would become more aware of the possibilities provided by these networks.

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EJN/2023/7 16.06.2023

## 60<sup>™</sup> PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK

12-14 June 2023 STOCKHOLM, SWEDEN

#### **EJN CONCLUSIONS**

#### The practical application of EIO/MLA procedures to obtain Encrypted information

On the occasion of the 60th Plenary Meeting of the European Judicial Network (EJN) under the Swedish Presidency of the Council of the European Union, the EJN Contact Points and partners discussed the impact and difficulties concerning organised crime investigations for which specific encrypted devices/applications were used for communication. Outcomes of the discussions on the experience and way forward for the European Judicial Network in the investigation involving Encrypted information are summed up below.

# **Background**

Encryption is a genuine means to protect user privacy, communications and devices. However, criminal organisations have started exploiting this technology, enabling them to conceal illegal activities from authorities.

Within the EU, the EncroChat Company provided an encrypted telephone solution with widespread use among criminal networks worldwide. In 2020, French and Dutch law enforcement and judicial authorities, with the assistance of Europol and Eurojust, managed to dismantle EncroChat. Since then, a number of similar successful operations within and beyond the European Union have followed, for instance, against SkyECC and Anom.

The millions of messages between persons located in different countries around the world have exhibited the high degree of sophistication and organisation of criminal groups and the seriousness of the crimes being committed. In order to proceed with the investigations of the accused identified and receive the information already available, Member States and other countries have sent a high volume of European Investigation Orders (EIOs) and Mutual Legal Assistance (MLA) requests which raised numerous judicial challenges.





#### Points discussed

In this light, EJN Contact Points within and beyond the EU, as well as partners, have reflected on the following issues:

## i. Type of measure

Countries initiating the investigation of criminal activities which concealed their communication by encrypted means have managed to obtain the evidence by infiltrating/intercepting the communications according to their legal system. As the digital and encryption aspects presented some novelties to authorities, the EJN Contact Points discussed if the requests for evidence were understood as a request for interception or a request for documentation already existing in the Member States.

Practitioners explained that after analysing the elements presented by the encrypted files, the EIOs or MLAs have been issued to retrieve the existing documentation since, at the core, they are documents that have presented new challenges giving rise to the necessity to establish on a sound evidential basis. This request is made as well with the assessment of necessity and proportionality to ensure that the request is made in accordance with the national and European Union legal Framework.

As the initial measure involved the interception of encrypted communications, Member States discussed if additional assessments were required. For instance, to this question, EJN Contact Points from BE, IT, ES, SE and DE have also remarked that it has been understood that another country has done the interception in accordance with their national legislation and procedural safeguards. Therefore, the country that has intercepted the communications has already performed the initial assessment performed by the judicial authorities on the principles of subsidiarity, legality and proportionality. EU Member States and other countries requiring the evidence have, under the principle of Mutual Trust, respected those procedures as initially evaluated by the authorities and that have been duly confirmed in different Court Instances.

The representative of the United States explained that the number of requests for encrypted communications has been escalating in the last months. In order to ensure that the Department of Justice can provide the evidence required, authorities sending an MLA request for this type of evidence should fulfil the 'probable cause' standard as the information is characterised as content data.

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Identified best practice: Generate understanding of the implications of encrypted information.

It has been highlighted that defence lawyers have gathered expertise and efficient mechanisms to exchange information on know-how and case law involving investigations with encrypted communications. Judicial authorities should also benefit from a similar exchange as investigations involving novel technologies present them with similar questions in different jurisdictions.

Authorities from different Member States and non-EU countries discussed that once it was understood that encryption was a method to secure digital data they learned about the process of gathering this information. The procedures for judicial cooperation were not more complex than in other situations. Therefore, training and understanding are essential for practitioners to proceed with these investigations.

## ii. Spontaneous exchange of information

As the evidence is retrieved by the country initiating the interception, the initial information is often shared by spontaneous exchange. The initial gathering of the communications is done as the country that initially intercepted the information believes that the evidence gathered is unknown – hence no MLA/EIO would be expected - and would assist another country in their investigations. In such cases, no request for mutual assistance will be forthcoming. During the discussions, EJN Contact Points explained that the spontaneous exchange had been done, for instance, through the following means:

- Spontaneous exchange of information under Art. 7 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union;
- Spontaneous exchange of information under Art. 26 of the Council of Europe Convention on Cybercrime; and
- Applicable Europol Handling Codes in data processing/exchanging.

## iii. Issuing authority

If the country that has received the information decides to proceed with a request, participants stated that they would send an EIO or MLA. The Issuing authority depends on the understanding of interception, data/documentary evidence, and the legal system. However, in





light of the latest decisions of the CJEU, and discussions in the Member States on the issuing authority, some EJN Contact Points stated that regardless of the measure at hand, the ElOs were issued by a court/judge.

When the judicial authorities would be required, for example, to issue a request for interception via EIO or MLA, it is established that a judge would consider a legal fiction and would need to assess if the measure would be possible under their jurisdiction as explained by NL, BE and DE.

However, for IE and UK, it was clarified that when making the request – not an order - via MLA, their common-law legal system presents them with particular challenges in obtaining the evidence. Judges in these countries do not have the competence to issue a court order for a measure outside their jurisdiction. The UK explained that the prosecutor would assess the proportionality and necessity instead of a judge.

## Identified best practice

During the discussions, it was highlighted that the principle of Mutual Trust on the legality of the initial proceedings was exhibited not only by EU Member States, that were seeking to carry on their own investigations utilising the information found on the encrypted communications, but also by other countries in the Western Balkan region, Kazakhstan and Japan.

#### iv. Admissibility of the evidence

EJN Contact Points discussed the admissibility of the evidence by their courts. Member States and non-EU countries extensively shared that national courts have, for example, in the case of EncroChat, admitted the files received by France as evidence in the criminal investigations. However, prosecutors and courts have not only relied upon the information received but also presented corroborating evidence that strengthened or confirmed the proof presented in these files, for instance, for the identification of the accused.

The AIAMP/RedCoop Network in Latin America provided written contributions through ES. The AIAMP Contact Point from Ecuador explained that they would request assurances over the custody/evidence. On the other hand, the Chilean representatives explained that they do not have particular rules over the admissibility of encrypted information. However, they would require the rules from the country where the Service Provider is located. They would respect the legislation and whether the evidence should be authorised by a prosecutor or by a judge because that may have an impact on the admissibility of the evidence during the trial.

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#### v. EJN Further contributions

EJN Contact Points highlighted significant positive aspects concerning the value of the Network, including the EJN website. The EJN has supported judicial authorities for the last 25 years and could focus additional activities for supporting national authorities and sharing their experience with the novelties brought by criminal investigations involving encrypted communications. Therefore discussions by the EJN Contact Points, partners, as well as the Conclusion Panel composed of representatives of Sweden, The Netherlands, Belgium and the EJN Secretariat, identified the following initiatives/activities for the Network:

## For the EJN Contact Points

- Organisation of EJN regional meetings on the investigation of cases involving encrypted communication: In line with the conclusions of the Meeting between the EJN Contact Points from the EU-WB, Member States are encouraged to organise meetings to promote discussion of the developments in cases involving encrypted communications.
- Share experiences and promote training: Under Article 4 of the EJN Decision, EJN Contact Points' function is to be involved and promote the organisation of training to ensure that international/national/local judicial authorities have access to the latest discussions and information in the area of international judicial cooperation. Therefore, during the discussions, it was concluded that the Contact Points should encourage training on the topic of encrypted communications and the lessons learnt. Furthermore this topic could be included in the EJN Language Training that encourages discussions on challenging judicial cooperation issues.
- Raise awareness with all judiciary authorities: EJN Contact Points are encouraged to share best practices, EJN conclusions, and the information available on the EJN website to ensure that practitioners in the Member States and non-EU countries understand the challenges and procedures ahead when investigating cases which include encrypted information/communications.
- Strengthen cooperation with EJCN: EJN and EJCN should continue strengthening cooperation and exchange discussions to share experiences and find joint solutions to support judicial authorities.

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## For the EJN website

- Describe EJN Contact Points specialisation: The EJN Contact Points should make sure to include their specialisation in the EJN website Contact Point List. This would support authorities to quickly identify the Contact Points that are specialised in the field and provide support to their national authorities as well as international authorities with the latest trends in judicial cooperation.
- \*\* Extend the information on the EJN website/tools: As the one-stop shop for information in the area of judicial cooperation in criminal matters, the EJN website is the most comprehensive tool for practitioners. In order to ensure that practitioners find the information they need, Contact Points identified the need to verify that the tools and website include additional information related to investigations involving encrypted communications. The EJN Fiches Belges and EJN Judicial Library should also include the most relevant judicial decisions and interlink their information to facilitate the search for practitioners.
- Include and share information with partners/networks: where possible, include the information on best practices and challenges faced with encrypted communication. For instance, Eurojust representatives proposed sharing documents (password protected) to support national authorities. Additionally, the Judicial Cooperation Network for Central Asia and Southern Caucasus (CASC) also offered to share information on their legal systems to be linked with EJN.





EJN/2023/6 16.06.2023

#### 60TH PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK

12-14 June 2023 Stockholm, Sweden

#### **EJN CONCLUSIONS**

## CURRENT DEVELOPMENTS ON THE APPLICATION OF THE EAW

Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (EAW FD) remains one of the most frequently used legal instruments in the field of judicial cooperation in criminal matters. The cases involving execution of European Arrest Warrant (EAW) are frequently facilitated by the EJN Contact Points<sup>1</sup>. This is why it is essential for the EJN to closely monitor and to regularly reflect on the practical application of the EAW in the EU Member States in order to timely address obstacles and detect best practices. This allows for better understanding of the differences in the national criminal procedures and facilitates the resolution of emerging cross-border legal issues.

The 60<sup>th</sup> EJN Plenary meeting provided an opportunity for the EJN Contact Points to discuss two aspects of the EAW proceedings, namely the speciality rule under Art. 27 EAW FD as well as the *in absentia* proceedings and the application of the CJEU case law in this regard. It was an occasion for the EJN Contact Points to reflect on the different national procedures that sometimes lead to issues and even refusals at the execution stage of the EAW as well as possibilities to overcome obstacles in the proceedings.

The EJN Contact Points pointed out that by using the EJN and the EJN website e-tools, judicial practitioners may avoid delays and potential non-execution of the EAWs already at the drafting stage of their request.

# I. EAW and in absentia

# **Background information:**

Framework Decision 2009/299/JHA amended the EAW FD by introducing Article 4a on decisions rendered in absentia. Article 4a concerns cases where a person has not been present

<sup>&</sup>lt;sup>1</sup> More than 1650 EJN EAW cases have been reported by the EJN Contact Points for 2021-2022





at the trial resulting in a decision regarding a custodial sentence and presents an optional ground for refusal to execute EAWs in cases where the person has not been given the possibility to take part in the proceedings. Article 4a EAW FD has been interpreted by the CJEU on numerous occasions with the view of providing guidance on its application in the Member States.

The EJN Contact Points addressed a number of remaining issues on the application on the various national procedures related to the fulfilment of the Article 4a prerequisites and the differences in their interpretation on the national level.

# Discussions and conclusions

By its judgment in the *Dworzecki case*<sup>2</sup> the CJEU established that the terms "summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision" and "by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial" are autonomous concepts of EU law and should be interpreted in the same manner across the EU. However, during the discussions it became apparent that judicial practitioners are still facing difficulties in the executions of the EAWs due to substantial differences in the interpretation of these terms in practice.

The EJN Contact Points noted that the differences in the national procedures related to in absentia on some occasions lead to refusal of execution of the EAWs. In fact, throughout the discussions it became apparent that in some of the EU Member States (such as NL and DE) this is the most invoked ground for refusal. The Contact Points acknowledged that this is partially due to the fact that some countries apply in absentia requirements as a mandatory ground for refusal and other countries as an optional ground for refusal.

Considerable differences have been observed in the national prerequisites and understanding of what constitutes summoned "in person". While some countries are applying the concept as personal serving of the summons on the person, in other Member States (such as PL and PT) it would be sufficient if the summons is delivered to a postal address provided by the person. This leads to situations where the issuing authority of an EAW indicates in the EAW form that the summon is delivered "in person" but is later on questioned by the executing authority in another Member State with narrower interpretation of the term and potentially even a refusal of the EAW. Very often due to the know differences in the national procedures, the issuing authority is asked to provide additional information on the steps taken to ensure that a

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<sup>&</sup>lt;sup>2</sup> Case C-108/16 Openbaar Ministerie v Paweł Dworzecki, para 32 Available here: https://curia.europa.eu/juris/document/document.jsf;isessionid=42347D2F5E3FBA0B85F4A7A950F5EC667text=&docid=178582&pageindex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=857292





**summons is indeed delivered "in person"**. The executing authorities in some Member States ask for such additional information in the majority of the cases and in others are not asking for these clarifications at all. The EJN Contact Points pointed out that as a consequence it might be that the same EAW can be accepted in one Member State and refused in another and as such called for more approximation on the definitions and the procedural rules.

Similarly, the participants concluded that there is **often a need to request additional information from the issuing EAW authorities when they have indicated that the summons was delivered "by any other means"**. In practice, very frequently the information provided is not sufficient to ensure that the *in absentia* prerequisites have been met by the issuing authorities. In some executing authorities (such as BE and DE) this causes considerable difficulties and, on occasion when the information is insufficient, they have released the person subject to the EAW.

#### Role of the EJN

The EJN Contact Points observed that the matters of *in absentia* and the national procedures determining in absentia vary across the EU. The Contact Points concluded that it would be useful for the practitioners if the EJN gathers information on national procedures related to *in absentia* such as summonsing, delivery of procedural documents and possibility for retrial. Such information should be integrated in the EJN Fiches Belges in order to facilitate the work of judicial practitioners. The same request was also made by the European Commission in relation to the new EAW Handbook.

The EJN Contact Points are often requested to provide information on the national legal procedures related to *in absentia*, supporting the EAW proceedings.

## II. EAW and the speciality rule

## **Background information:**

Within the context of the EAW FD, the speciality rule is included in Article 27 (prosecution for other offences) and Article 28 (subsequent surrender/extradition). However, the rule of speciality is subject to a number of exceptions. The FD EAW gives a possibility to Member States to notify that they renounce the rule of speciality under certain circumstances and Article 27(3) of the FD EAW lists other situations where the rule of speciality does not apply. The scope of the rule was examined by the CJEU in Case C-388/08<sup>3</sup> where the Court gave an

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<sup>&</sup>lt;sup>3</sup> Case C-388/08 Criminal proceedings against Artur Leymann and Aleks el Pustovarov, available here: <a href="https://eur-lex.europa.eu/lessi-content/en/TXT/?uri=CELEX:5200BCI0588">https://eur-lex.europa.eu/lessi-content/en/TXT/?uri=CELEX:5200BCI0588</a>





indication on how to determine whether the offence under consideration is an 'offence other' than that for which the person was surrendered within the meaning of Article 27(2) of the FD.

The EJN Contact Points addressed some practical aspects related to the application of the speciality rule and the transmission of the request itself.

#### Discussions and conclusions

The EAW FD does not foresee a specific form to be used by the issuing authority for the request for exception from the speciality rule. It has been noted by the EJN Contact Points that the practice varies across the EU Member States. Throughout the discussions the majority of the participants concluded that **although a new EAW is not strictly required for this, the requests for consent are very often submitted in the form of an EAW**.

In light of this, the EJN Contact Points discussed the need to have a separate unofficial form prepared by the EJN for requesting consent in order to streamline and facilitate the work of judicial practitioners when drafting the requests. The participants confirmed that it might be worth further discussing it within the EJN but also agreed that there should be flexibility in the way the information is submitted in order to ensure that there are no unnecessary delays in the procedures.

Additionally, the participants discussed the need to invoke the speciality rule in cases where the issuing authority, following the surrender, would like to apply regarding aggravating provisions to the indictment resulting in higher sentencing. The EJN Contact Points concluded that no consent would be required as such request is based on the factual circumstances and the criminal act rather than the penalty.





EJN/2023/9 16.06.2023

# **60<sup>TH</sup> PLENARY MEETING OF THE EUROPEAN JUDICIAL NETWORK**

12-14 June 2023 Stockholm, Sweden

#### **EJN CONCLUSIONS**

#### TRANSFER OF PROCEEDINGS

At the 60<sup>th</sup> Plenary Meeting of the European Judicial Network (EJN) under the Swedish Presidency of the Council of the European Union, the EJN Contact Points and partners discussed the European Commission proposal for a Regulation on the transfer of criminal proceedings between Member States. The outcome of the discussions on the EU Commission proposal for a Regulation on the transfer of criminal proceedings is the following.

#### **Background**

On April 5<sup>th</sup>, 2023, the EU Commission proposed a Regulation on the transfer of criminal proceedings with a view to improving the efficient and proper administration of justice<sup>1</sup>.

The purpose is to have a common legal framework with a double aim:

- preventing and avoiding unnecessary parallel criminal proceedings in different Member States concerning the same facts and the same person that could result in an infringement of the *ne bis in idem principle*;
- avoiding impunity when the surrender of a person on the basis of an European Arrest Warrant issued for the purpose of prosecution, is refused.

The challenges that Member States' authorities face in the current legal set-up have been summarised in the analytical staff working document accompanying the proposal<sup>2</sup>.

<sup>&</sup>lt;sup>1</sup> Document 52023PC0185, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transfer of proceedings in criminal matters, COM/2023/185 final. <u>EUR-Lex - 52023PC0185 - EN - EUR-Lex (europa.eu)</u>

Document 52023SC0077, COMMISSION STAFF WORKING DOCUMENT Analytical Supporting Document Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, SWD/2023/77 final.
EUR-Lex - 52023SC0077 - EN - EUR-Lex (europa.eu)





## Points discussed

At the 60<sup>th</sup> Plenary Meeting of the EJN the participants of Workshop IV - 'Transfer of proceedings', discussed some aspects of the practical application of the 5<sup>th</sup> April 2023 proposal. They also considered the amendments of the Swedish Presidency, made in the week before, to some of the provisions of the proposal of 5<sup>th</sup> April 2023.

The EJN Contact Points reflected on the following provisions of the proposal:

- i. Scope of application,
- ii. Subsidiary jurisdiction,
- Rights of the suspect or accused person and Rights of the suspect or accused person, and the victim to be informed of the intended transfer (without prejudice of confidentiality) and right to a legal remedy,
- iv. Grounds for refusal and obligation to consult prior refusing the transfer,
- v. and, on the role of the EJN in the negotiations and afterwards.

## i. Scope of application

Article 1 sets out the subject matter of the new instrument.

The text of the original proposal limited the scope of application to criminal proceedings in which a person has already been identified as a suspect. The vast majority of the participants thought that it was not necessary to limit the scope of this instrument.

The Council document issued on June 7, 2023 proposes to enlarge the scope even to proceedings where the suspect is unknown. All the participants to the workshop welcomed this evolution.

## ii. Subsidiary jurisdiction

The second point discussed was about subsidiary jurisdiction. More precisely the discussion was whether it is preferable to have a list of cases of subsidiary jurisdiction or a general provision as in the Convention of the Council of Europe.

Article 3 of the regulation's proposal lists various situations when jurisdiction in the requesting State, following the request to transfer the proceedings, provides jurisdiction in the requested





State, even if otherwise it would not have jurisdiction to prosecute and try the offence according to its national law:

- when an EAW issued against a national or a resident in the executing State has been refused according to art. 4 par. 7 subpar. b) of FD 2002/584/ JAI (the offence has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside its territory);
- 2) when an EAW issued against a national or a resident in the executing State has been refused on the ground that surrender would entail a manifest breach of a relevant fundamental right as set out in Article 6 of the TEU and the Charter (in most of cases because of the poor detention conditions in the issuing State);
- most of the effects of the criminal offence or a substantial part of the damage occurred in the territory of the requested State;
- there are ongoing criminal proceedings in the requested State against the suspect or accused person in respect of other facts and the suspect or accused person is a national/resident of the requested State;
- 5) there are ongoing criminal proceedings in the requested State in respect of the same or partially the same facts against other persons and the suspect or accused person in the criminal proceedings to be transferred is a national/resident of the requested State.

On the contrary, Article 2 of the CoE Convention of 1972 stipulates a more general provision on subsidiary jurisdiction, according to which "any Contracting State shall have competence to prosecute (...) any offence to which the law of another Contracting State is applicable".

Opinions were divided on that discussion point. Some participants considered that a list is preferable because is more precise, easier to use for practitioners and more certain. Whereas others considered that a list has inconveniences, as it may not be complete.

Overall, the participants considered both approaches good. They were looking forward to the outcome of the negotiations.

#### iii. Rights to be informed and right to a legal remedy

The third point of discussion was about the *Rights of the suspect or accused person and Rights of the suspect or accused person and the victim to be informed of the intended transfer (without prejudice of confidentiality) and right to a legal remedy.* 

First the participants discussed the right to be informed.

The initial draft of the regulation provides that the suspect / the accused person and the victim have the right to be informed when there is transfer of proceedings considered.





Most of the participants were quite sceptical on the obligation to inform the suspect/accused person/victim at this stage. In particular this is because it may be very cumbersome, the added value of this information is not obvious and there are practical difficulties. The situation where there are a lot of victims was specifically pointed out. Most of the participants considered that this information should not be mandatory; they welcomed the latest version of the text where this information has to be made only 'if it is considered appropriate'.

Then, the participants considered the right to a legal remedy. Most of them were quite sceptical about the need for a legal remedy against a decision to transfer the proceeding. Several participants pointed out that that there is no such remedy in the national legislation and that the transfer of proceeding is a question of the administration of justice rather than an act of jurisdiction.

## iv. Grounds for refusal and obligation to consult prior to refusing the transfer

About the grounds for refusal, the list of points for refusal that is set out in the actual proposal was considered good and to give the necessary flexibility that is useful for the proper application of this instrument.

Regarding the obligation to consult before refusing a transfer, there were lengthy discussions about the necessity of such a consultation. For instance, it was put forward that when the offence does not exist in the requested State there is no such necessity.

The participants considered that this obligation to consult prior to refusing the transfer, should be also only 'when appropriate' and not mandatory.

## v. Role of EJN in negotiations and afterwards

The EJN contact points considered that the EJN could provide relevant expertise - namely the input of practitioners.

During the ongoing negotiation, the point of view of the practitioners could be made available especially regarding the structure of the form that will be used by practitioners once the regulation is in force.

Furthermore, once this instrument would be in force, the EJN should also be involved when assessing its practical application, for instance through questionnaires, on how the instrument works, and what could be improved.