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Subject:	The impact of COVID-19 on judicial cooperation in criminal matters - Executive summary of information compiled by Eurojust and EJN

Delegations will find attached an executive summary of the compilation by Eurojust and by the European Judicial Network (EJN) of information received by Eurojust, by the EJN and by the Presidency/General Secretariat of the Council, on the impact of the measures taken by governments to combat the spread of COVID-19 on judicial cooperation in criminal matters in the European Union (and Iceland and Norway) and on the way forward.

The text has been updated with input received by Friday 16 July 2021.

The impact of COVID-19 on judicial cooperation in criminal matters**Executive summary of Council doc. WK 587/2021 REV 12**

The measures taken at the national level to combat the spread of the coronavirus (COVID-19) have had a significant impact on judicial cooperation in criminal matters in the European Union, Iceland and Norway.

In March 2020, the Council submitted a first questionnaire to the Member States, Iceland and Norway on the impact of said national measures on judicial cooperation instruments. In parallel, Eurojust and EJM collected information from the Member States on the same topic. In view of the rapidly evolving situation, in April 2020 the Council gave a mandate to Eurojust and EJM to prepare a compilation of all the information collected and to regularly update it in order to continuously assist practitioners in the application of judicial cooperation instruments in criminal matters.

In June 2020, the Council published a compilation of the Member States' replies to a Questionnaire on the impact of COVID-19 on SIRENE work on surrenders, extraditions of persons and transfers of convicts (Council doc. WK 6425/2020 INIT) which was integrated in the 11th revision of the compilation (Council doc. WK 3472/2020 REV 11).

The present executive summary gives an overview of the main practical and legal issues identified from an analysis of the replies included in the 12th revision of year 2021 of the compilation (Council doc. WK 587/2021 REV 12) on the following legal instruments and topics:

- Framework Decision 2002/584/JHA on the European Arrest Warrant¹;
- Extradition from/to third States;

¹ To Republic of Iceland and the Kingdom of Norway applies the Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.

- Directive 2014/41/EU on the European Investigation Order;
- Mutual legal assistance in criminal matters;
- Framework Decision 2008/909/JHA on the transfer of sentenced persons;
- Framework Decision 2003/577/JHA on freezing orders²;
- Framework Decision 2006/783/JHA on confiscation orders³;
- Framework Decision 2002/465/JHA on Joint Investigation Teams.

In several States the situation improved considerably since May 2020, and more notably in June 2020. Since then, the execution of judicial cooperation instruments gradually went back to normal and several States declared the end of the state of emergency. This situation went on towards the end of October 2020, where notwithstanding the evolution of the pandemic situation of COVID-19, the contributing States reported that the general health and restrictive measures had no significant impact on the execution of judicial cooperation instruments.

Although November 2020 saw a recrudescence of the COVID-19 pandemic, with more stringent health and safety measures progressively implemented also through 2021, the contributing States highlighted that there has been no major and noteworthy impact on the execution of judicial cooperation instruments, as a whole. This trend continues up till now.

² Replaced by 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, that entered into force on 19 December 2020.

³ Replaced by 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, that entered into force on 19 December 2020.

1. European arrest warrants

The surrender procedure under the Framework Decision on the European Arrest Warrant (EAW FD) is the main focus of the compilation. European Arrest Warrants (EAWs) have a direct impact on the personal freedom of the requested persons – or at least gives rise to a restriction of their freedom of movement – and is by nature an urgent proceeding in all its phases, as provided in Article 17(1) EAW FD.

The COVID-19 crisis had an **impact on both the issuing and the execution of EAWs**. However, at the beginning of June 2020 and up to the beginning of October 2020, some States noted that the gradual opening of the borders and resuming of flights slowly brought the situation back to normal, allowing the actual execution of EAWs. However, persisting limitations in commercial flights, both as to their frequency and destinations, continued to represent an obstacle as to the surrender procedures. In early 2021, obstacles represented by flight limitations had been reaffirmed by the increased level of restrictions and health measures in place to contain the developments of COVID-19 situation. No major changes have been reported recently in this area by the contributing States.

Impact on the issuing of EAWs

In relation to the issuing of EAWs, the vast majority of EU judicial authorities have continued to issue EAWs as normal. Yet, some States prioritised the issuing of EAWs, either following the adoption of specific guidelines issued by the public prosecutors' offices, where public prosecutors are the issuing authorities or nevertheless trigger the issuing procedure (e.g. limiting the issuing of EAWs only to urgent or very serious cases), or as an indirect result of the general limitations on judicial activities during the pandemic. At one stage a number of States reported that the activities of the judicial authorities largely resumed, gradually returning to their regular service. While before some national authorities were predominantly working only with serious urgent cases, work is gradually resuming in all cases.

Impact on the execution of EAWs and the actual surrender by air or by land

As to the execution of EAWs, in general terms, the proceedings opened in the executing State for the recognition and execution of EAWs were not affected and were carried out normally without significant impediments. However, the measures adopted in the context of the COVID-19 crisis caused a **major impact** on the last phase of the surrender procedure, as they often have led to difficulties in carrying out **the actual surrender of the requested person** to the issuing State after a judicial decision to this effect had been taken and became final. While no State has generally suspended the execution of surrenders, in specific cases it became impossible to transfer the requested person to the issuing State due to the practical and legal measures adopted at national level to combat the COVID-19 crisis. This has been the case, for instance, where flights reduction or travel restrictions are still in place, or there are restrictions in place for the escorting officers to travel abroad preventing the issuing State from taking over the requested person.

In this respect, the feasibility of each transfer needs to be assessed on a case-by-case basis and often depends on the practical arrangements in place. In general, transfers taking place **by land** (particularly between neighbouring States) have had a higher chance of success than those taking place **by air** (due to reduced or suspended air traffic).

Recently some States have reported that surrenders by air can still be problematic, especially due to limited air traffic (unavailability of some flights/connections) or travel restrictions. This can prevent observing the 10-day time limit for the surrender. Some States report backlog in the EAW execution from the earlier lockdown. Lately the situation has been stabilising, but delays in surrender may still be experienced.

Postponement of the actual surrender

Where surrender is not possible in the individual case due to the measures taken as reaction to the COVID-19 crisis, the executing judicial authorities normally **decide to postpone the surrender pursuant to Article 23 EAW FD**. This legal framework is generally considered sufficient to face the current situation.

As regards the specific reason justifying the postponement of surrender, there has been no common approach among the Member States. While many States invoked the circumstances of *force majeure* under Article 23(3) EAW FD, a few others, bearing in mind that the duration of this pandemic is unpredictable, preferred to rely on the serious humanitarian reasons set forth by Article 23(4) EAW FD. Finally, there are several States that applied either **Article 23(3) or Article 23(4) EAW FD, depending on the specific circumstances of the individual case**. In both scenarios, a consultation between the executing and issuing authorities was necessary to agree on a new surrender date. However, under Article 23(3) EAW FD it is necessary for both judicial authorities to immediately contact each other, consult each other on a regular basis, and reach an agreement on a concrete new surrender date. This would have to be linked to the end of the state of emergency or confinement measures adopted by the Member States and cancellation of flights. It is noteworthy that the compilation - as a living document – includes updates provided by the contributing States on the extension and conclusion of the state of emergency or any confinement measures or deadlines and therefore contains relevant information to set new surrender dates in accordance with Article 23 (3) EAW FD.

In contrast, under Article 23(4) EAW FD the authorities involved are initially exonerated from such obligation as it is provided that surrender shall take place as soon as the grounds justifying the postponement have ceased to exist and, therefore, the executing judicial authority shall eventually and immediately inform the issuing judicial authority and then agree on a new surrender date. Furthermore, taking into consideration the unpredictable nature of this situation, judicial authorities have been prompted to explore the possibilities of having recourse to other measures alternative to surrender (e.g. issuing an European Investigation Order to hear the requested person via videoconference during the trial phase, with their consent, in order to avoid an adjournment of the trial, transfer of criminal proceedings or taking over the enforcement of a custodial sentence).

In the event that surrender was temporarily postponed, the executing judicial authorities were called to review the prolongation of the requested person's arrest until the actual surrender becomes possible. Several States have reported cases where, based on the circumstances of the specific case, prolonging detention would be in conflict with the principle of proportionality and the executing judicial authorities have accordingly **released the requested person** and adopted **measures to prevent the person from absconding** pursuant to Article 12 EAW FD (e.g. obligation to report to the police, travel ban, probation orders, bail, house arrest). There have also been cases where the prolonging of detention awaiting the feasibility of surrender led to the withdrawal of the EAW and the release of the requested person. Again, the **importance of consultations with the issuing authorities** is underlined in order to refresh the reasons for maintaining the arrest or not.

Since in the past few months the spread of the corona virus had been under control, a contributing State has reported that the existence of a *force majeure* was not frequent. Restart of actual surrenders has also been reported. The dates for the surrenders can be negotiated via SIRENE or INTERPOL channels as well and agreed on a case by case basis.

Extensions to surrender caused by the COVID-19 precautionary measures seem now to be an exception. Since in many States the travel restrictions were being lifted, most of the surrenders previously postponed have now been executed. Postponement of surrender decisions may however still happen, as long as the COVID-19 circumstances are not completely overcome (for example lack of direct flights, request for a negative COVID-19 test, etc.). The gradual return to normality had a positive impact also on the restart of usual activities by the judicial authorities.

Transits

Only a few States suspended all transits. In the majority of States, transits remained in principle possible, but subject to a case-by-case assessment. In practice, the main difficulties were caused by the flight and lockdown restrictions and precautionary measures in place (such as a requirement to show recent negative COVID-19 test results).

Precautionary measures

The majority of the States have adopted precautionary measures to safeguard the health of the surrendered person and escorting officers where surrender actually took place.

Some States have requested a negative COVID-19 test in relation to the **surrendered person**, while others have solely requested a general medical certificate. A few States previously reported no requirements of health certificate, however, the person should not have had any symptoms of COVID-19. Moreover, additional precautionary measures might be taken on a case-by-case basis. In many States, the surrendered person has to wear protective equipment (mask, gloves) during the surrender and will be placed in quarantine upon arrival. The latest updates do not refer specifically to those precautionary health measures. Despite the emergence of new COVID-19 variants, thanks to the progress in the vaccinations, the general trend in the EU is a gradual reopening of the society and resuming of the judicial cooperation activities.

Most States have applied general rules in relation to the **escorting police officers** and the protections that have been obligatory for the general population (e.g. wearing a mask, gloves, social distancing, disinfection, hotel rules, etc.). Only very few States explicitly mentioned that they applied quarantine rules to police officers. The rules for the escorting officers have however been changing, depending on the actual situation. In the contributions lately received, it is mentioned that most of the police officers already received the COVID-19 vaccine. Other States reported that the escorting officers are expressly exempted from measures normally applicable for entering the country, unless coming from high risk countries.

In view of recent developments, revisions leading to the lifting of the precautionary measures in place are foreseeable in all States. The currently applied “traffic light” system and/or the requirement of being fully vaccinated have also impacted on the conditions requested for entering a territory of a State (e.g. required negative COVID-19 test result, (self-)quarantine or exceptions to it).

2. Extradition

Also in relation to extradition requests from third States, the measures adopted at national level in relation to COVID-19 have an impact on the **execution of the actual surrenders**, which in several States are being postponed to the end of the crisis. Currently, the **main obstacle** States are **still facing** are the **limitations of flights with some third States**. This does not pose major problems in the context of extradition. As in other areas, the gradual lifting of restrictions and precautionary measures in the States, as well as the resuming of flights to/from third States indicate that issues previously faced in the extradition are expected to progressively diminish. Nevertheless, in a specific case it still depends on which third State is concerned.

3. European investigation orders and mutual legal assistance requests

The measures as initially imposed in the context of the COVID-19 crisis had an impact on the issuing, but especially on the execution of other judicial cooperation instruments. However, at one point the resumption of judicial activities has brought the situation back to normal, also in relation to the issuing and execution of EIOs. **Alternative solutions were identified** during the early crisis **for the execution of EIOs**, such as hearings via video or telephone conferences. Although those solutions are still considered preferable, in the light of the recent improvement in the general health situation, some Member States reported that EIOs and MLA requests, especially in the pre-trial phase, are executed normally. Where possible, hearing by video-conferencing or other approved instrument of remote technology are still in place.

Some States indicated that **the issuing of European Investigation Orders (EIOs) or requests for mutual legal assistance (MLA)** continued as usual. Others had previously informed that the issuing of these instruments decreased and that prioritisation applied. In some of these States, EIOs are being issued and translated, but the transmission by regular postal service to the executing State has still occasionally been affected, suspended or postponed.

In most States, **the execution of EIOs and MLA requests** was initially restricted to urgent cases and/or postponed, in particular in those States where the adopted state of emergency implied the suspension of procedural time limits and hearings. Where this prioritisation applied, the main criteria used besides urgency were, for instance, the seriousness of the offence, whether the suspect is under pre-trial arrest, the risk that evidence will be lost and the stage of the proceedings in which the evidence was to be gathered. A **case-by-case evaluation** applied. Furthermore, even in the States that did not apply a prioritisation, delays in the execution could (and may still) occur if general confinement measures were in place, limiting judicial activity (e.g. remote working of judges and prosecutors). In this respect, in several States **measures requiring physical contact (e.g. house searches, hearings in person, etc.) were postponed or, if feasible, adequate alternatives put in place** (e.g. hearings taking place via video- or telephone conferences). While in some States it was always possible to request the appearance of a person before the competent authorities, in others videoconference was the preferable way to hear a person, and in some States even the only way possible. In a few other States, house searches were executed as normal. Furthermore, in some States, participation by the issuing authorities was either not permitted or allowed only where necessary after an assessment on a case-by-case basis. In general terms, non-urgent investigative measures were in principle put on hold.

As to the means of transmission of EIOs and MLA requests, **the majority of the States recommend electronic transmission of requests (i.e. by email)** as the most effective means in the current situation. This is still the case, especially with regard to urgent requests. Most States encourage addressing the requests directly to the competent executing authorities, while others recommend sending the request to a centralised email address as the executing authority may not be directly reachable in the current circumstances.

In one instance, a high number of requests for **e-evidence** was reported. The legal process in obtaining e-evidence had also been affected by both the restrictions put in place during the pandemic and the fact of working from home. This led to prioritization of such requests on the basis of urgency/seriousness of the crime. The situation resulted in a built up backlog, later addressed by putting in place dedicated personnel and an *ad hoc* email address enabling faster transmission of such MLA requests for e-evidence (seeking and obtaining a preservation order from the communication service providers). It has however been possible to obtain and transmit e-evidence in the most urgent serious cases.

In several contributions it was highlighted that **Eurojust and the EJM facilitate transmission of EIOs/MLA requests, exchange of information and identification of the competent executing authority.**

4. Transfer of sentenced persons

Most States initially suspended the transfer of sentenced persons, however later in several States these transfers became possible again. In those States where the transfer of sentenced persons has been possible, an assessment is done on a case-by-case basis, and in some States urgent cases can still be prioritised. In such cases, it was also underlined that the time limit of 30 days for the execution of the transfer under Article 15(1) FD 2008/909/JHA was not likely to be met. Practical issues encountered by national authorities when carrying out transfer were mainly related to the closure of internal EU borders and the cancellation of flights, as well as situations that require physical contact and medical screening. Sanitary rules are to be observed for the interest of the sentenced persons and the escorting officers. Persons transferred to other States might still be placed in quarantine. Some States specified that decisions on the recognition of judgments continue to be issued.

Some States reported that transfers of sentenced persons to other Member States are possible, with the only practical issue being the unavailability of some flights. While a few others mentioned that transfers were suspended due to COVID-19 safety measures and restrictions. At present, the situation is returning back to normal. The handover/takeover of sentenced persons is generally possible; in some cases depending on the available airline connections. This limitation does not apply with border States where, based on the received replies, transfers are reported to be taking place smoothly. Whether the sentenced person has been vaccinated or not also plays a role.

5. Freezing and confiscation orders

While in many States the situation did not change with respect to freezing and confiscation orders, **several other States applied prioritisation in the issuing of certificates for the mutual recognition of freezing and confiscation orders in urgent cases.** This was very often not the result of an *ad hoc* policy, but rather an indirect effect of the general limitations on judicial activities. However, this prioritisation **did not seem to affect freezing orders as they are generally regarded as urgent** due to the risk of dissipation of assets.

6. Joint Investigation Teams

Joint Investigation Teams (JITs) continued to operate regularly in most States, with the main difference that **travel and physical meetings between JITs' members were not regularly taking place or were taking place to a limited extent, depending on the restrictions imposed by to National Authorities.** With the gradual reopening of borders and the end to the suspended judicial and law enforcement activities, the JIT activities are also expected to get back to normal. An example was provided by a Member State, which reported that even during the most severe time during the COVID-19 pandemic, they only recorded delays in two JITs out of 24 in progress.

7. General issues

Another measure having a significant impact also in the field of judicial cooperation in criminal matters was the **remote working**, as most judges and prosecutors were teleworking (from home), and therefore the activities of the national courts and public prosecutors' offices were limited. Only judges and prosecutors on duty 24/7 dealt with very urgent requests. A case-by-case approach showed to be the predominant one under the COVID-19 circumstances. **Even though the further worldwide waves in the COVID-19 pandemic led to the reintroduction of restrictions in certain States, these have not necessarily had a direct or significant impact on judicial cooperation in criminal matters.**

In most Member States, **SIRENE Bureaux** worked at limited capacity during the early period of the pandemic, although no serious problems arose in the exchange of information. From the information transmitted it seems that in principle **SIRENE Bureaux** in all Member States work to their full operational capacity.

The contributing States recently reported a gradual easing of public health restrictions, being however prepared to adjust them subject to the prevailing public health situation.

This approach is expected to have an impact also on the judicial cooperation.
