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Delegations will find attached an executive summary 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 21 January 2022.

The impact of COVID-19 on judicial cooperation in criminal matters

Executive summary of WK 892/2022

Executive summary

The measures taken at national level to combat the spread of the coronavirus (COVID-19) have had a significant impact also 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 the European Judicial Network (EJN) 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 to the EJN 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 document version of 21 January 2022 (WK 892/2022) on the following legal instruments and topics:

- Framework Decision 2002/584/JHA on the European Arrest Warrant ;
- Extradition from/to third States;
- 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 orders ;
- Framework Decision 2006/783/JHA on confiscation orders ;
- 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 informed that there has been no major impact on the execution of judicial cooperation instruments, as a whole.

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 Warrant (EAW) has 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. Persisting limitations in commercial flights, both as to their frequency and destinations, nevertheless continued to represent an obstacle as to the surrender procedures. In 2021, obstacles represented by flight limitations had been reaffirmed by the increased level of restrictions and public health measures in place reflecting the developments of COVID-19 pandemic. No major changes have recently been reported 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. In some instances States prioritised the issuing of EAWs, either following the adoption of specific guidelines issued by the public prosecutors' offices by 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 to regular service.

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 persons 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. 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) had a higher chance of success than those taking place **by air** (due to reduced or suspended air traffic).

In past months, some States still reported that surrenders by air could be problematic, especially due to unavailability of some flights/connections or travel restrictions preventing the observing of the 10-day time limit for the surrender. Some other States reported backlog in the EAW execution.

At one stage, the situation seemed to have stabilised, with fewer delays experienced. Lately, some States reported that the new coronavirus variant (Omicron) has again caused delays in the execution of surrenders. Moreover, surrenders are made conditional to a negative PCR test or alternative solutions apply (e.g. in a case of no legal basis for enforcing the testing, arrangements may be made for chartering a plane or alternative routes are found).

Postponement of the actual surrender

Where surrender was not possible in the individual case due to the measures taken as reaction to the COVID-19 pandemic, the executing judicial authorities normally **decided to postpone the surrender pursuant to Article 23 EAW FD**. This legal framework is generally considered sufficient to face the ongoing 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, confinement measures adopted by the Member States or the 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.

Restart of actual surrenders has been reported by the contributing States. The dates for the surrenders can be negotiated via **SIRENE** or INTERPOL channels as well and agreed on a case-by-case basis.

From the most recent contributions it shows that majority of the surrenders previously postponed have 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 proof of vaccination or/and negative COVID-19 test, etc.).

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 (facemask) during the surrender and will be placed in quarantine upon arrival. The latest updates do not refer specifically to those precautionary health measures. The emergence of new COVID-19 variants, despite the progress in the vaccinations, has caused frequent changes in the reopening of the society. The judicial cooperation activities however seem having resumed.

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 facemask, 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 received, it is mentioned that most of the police officers 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 the recent developments, revisions of the application of 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 impact on the conditions requested for entering a territory of a State.

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**. The **main obstacle** States are **still facing** is the **limitation in air traffic with some third States**. However, this does not pose major problems in the context of extradition.

While at one stage the gradual lifting of restrictions and precautionary measures in the States, as well as the resuming of flights to/from third States indicated that issues previously faced in the extradition were expected to progressively diminish, lately, with the spreading of the Omicron variant, extradition may depend on which is the third State 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, 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. previous 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 usually. 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.

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. The handover/takeover of sentenced persons is generally possible; in some cases depending on the available airline connections or the applicable health safety measures. 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 can also play 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 the National Authorities.**

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 have led to the reintroduction of restrictions in the majority of 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 on the **adjustments to the public health measures**, subject to the prevailing situation at the given time. The current developments in relation to the Omicron variant are already affecting staffing levels in some national judicial services. This situation may also have impact on the judicial cooperation in criminal matters.
