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COVER NOTE

From: EJM Secretariat
To: EJM Contact Points
Subject: European Arrest Warrant

The EJM Contact Points will find hereunder a discussion paper with regard to the current developments on the practical application of the European Arrest Warrant (EAW).

Current developments on the application of the European Arrest Warrant

I. INTRODUCTION

The Framework Decision 2002/584/JHA on EAW (EAW FD) was adopted by the Council already on 13 June 2002. It was the first and currently is one of the most frequently used legal instrument involving cooperation between the Member States on criminal matters based on the principle of mutual recognition. Since its adoption, the EAW has been the subject of numerous preliminary rulings of the CJEU on the interpretation of the provisions of the EAW FD.

With this paper, we propose to bring into discussion a number of relevant developments in the area of EAW, that have great impact on the practical application of the EAW, namely: execution of EAWs in situations of *in absentia* judgments, proportionality test for issuing EAW and jurisprudence of the CJEU on the interpretation of the term “issuing judicial authority” in Article 6(1) EAW FD and on detention conditions in the facilities in the Member States.

II. EAW'S REGARDING IN ABSENTIA JUDGMENTS: SURRENDER OF NATIONALS OR RESIDENTS OF THE EXECUTING STATE

The EAW FD allows the executing member state to refuse surrender of its own *citizens or residents if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order*. The system established by the EAW FD, makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State. Such provisions are foreseen in Article 4 and Article 5 of the EAW FD to ensure the reintegration of the sentenced persons in the society¹.

A. Grounds for optional non-execution of the European arrest warrant - Article 4 EAW FD

According to Article 4(6) “*The executing judicial authority may refuse to execute the European arrest warrant if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law*”.

In its jurisprudence, the CJEU has interpreted the meaning of this provision in the *Poplawski I* case². In this case the Court underlined that Article 4(6) EAW FD is an optional non-execution ground and the provision envisages a margin of discretion for the executing judicial authority to assess whether or not it is appropriate to refuse the execution³. The Court further elaborated that this assessment should give particular weight to the possibility of increasing the requested person's chances of reintegrating into society. In addition, before the executing Member State is able to invoke this provision, it shall make an

¹ Case C- 123/08 *Wolzenburg* (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-123/08>), para. 62

² Case C-579/15 *Daniel Adam Popławski* (<http://curia.europa.eu/juris/liste.jsf?num=C-579/15>)

³ *Ibid*, para 21

assessment of whether it is actually possible to execute the sentence in accordance with its domestic law⁴.

Regarding custodial sentences a member state may also refuse to execute an EAW if the decision was rendered in absentia. This ground for non-execution, however, contains several exceptions. For instance, according to Article 4a(1)(d) of the Framework decision, the executing judicial authority cannot refuse to execute an EAW based on a decision rendered in absentia where the sought person was not personally served with the decision but: (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate in the issuing state.

B. Guarantee for the sentenced person to be returned to the executing Member State – Art 5(3) EAW FD

In light of the CJEU ruling in Case-306/09 I.B.⁵ it is possible to infer that EAWs issued for the purpose of executing in absentia judgment may and should have the same effects as EAW's issued for the purpose of conducting a criminal prosecution. In its ruling the CJEU was applying Article 5 (3) of the Framework Decision according to which where a person who is the subject of an EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.

Even though the afore-mentioned Article 5(3), by its wording, only refers to EAW's issued for the purpose of prosecution, the CJEU found that the execution of an EAW for the purposes of execution of a sentence imposed in absentia, may be subject to the same condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organized in his presence in the issuing Member State.

Points for discussion:

- 1) How did your national law implement Art 4(6) EAW FD? Does your national legislation provide for the optional, or even mandatory, non-execution of an EAW regarding execution of a custodial sentence, where the requested person is staying in, or is a national or a resident of your country? What are the conditions/aspects assessed when taking the decision?
- 2) If the answer to question 1 is "yes", does such ground for refusal apply also to *in absentia* judgments?
- 3) In light of CJEU judgment in Case C-306/09 I.B., would it be possible in your Member State to execute an EAW regarding execution of an in absentia judgment concerning your own nationals/residents, even if the person refuses to be surrendered, under condition that he or she be returned to the executing State to serve there the sentence passed against him, following a new trial organized in his presence in the issuing Member State?

⁴ Ibid, para 22

⁵ Case C-306/09 I.B. (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-306/09>)



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- 4) If the sought person (a national or resident of the executing state) announces in the executing state that he or she would not request a retrial (or appeal against the *in absentia* judgment), would such announcement be binding in your Member State being the issuing state? Would it be binding in your Member State being the executing state (meaning that the prison sentence may be served in your country even if the judgment does not live up to the required standards) or could the sought person when starting the execution of the prison sentence demand his right for retrial or appeal and thus hinder the execution?
- 5) With regards to *in absentia* judgments, would it in your country be possible to organize the retrial or appeal trial by hearing the defendant via video conference (EIO) and thus letting the defendant be heard in the country of nationality or residency? Could this be an alternative to issuing an EAW against the sentenced person?
- 6) Do you think it would be useful if the EAJ produces a compilation of the national procedural laws related to *in absentia* trials – i.e. summoning of defendants, guarantees for possibility for appeal etc?

III. CHOOSING BETWEEN EAW AND EIO: PROPORTIONALITY TEST?

Based on the EAW FD, it is evident that an EAW should always be proportional in relation to its aim. Even in situations, where the circumstances of a particular case fall within the scope of Article 2(1) of the EAW FD, issuing judicial authorities are advised to consider whether issuing an EAW is justified in a particular case.

Taking into account the severe consequences the execution of an EAW has on the requested person's liberty, as well as the restrictions regarding free movement, the issuing judicial authorities should consider a number of factors in order to determine whether the issuance of an EAW is justified. Particularly, the following factors⁶ could be taken into account: (a) the seriousness of the offence (for example, the harm or danger it has caused); (b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); (c) the likelihood of detention of the person in the issuing Member State after surrender; (d) the interests of the victims of the offence.

Therefore, the issuing judicial authorities should consider whether other judicial cooperation measures could be used instead of issuing an EAW. Other EU instruments based on the principle of mutual recognition on judicial cooperation in criminal matters provide for alternative measures, that in many situations, could be also effective but less coercive

⁶ European Commission notice of 28.9.2017, *Handbook on how to issue and execute European Arrest Warrant*, point 2.4.

There are several other measures available, that complement the EAW. In some situations, these measures might be more appropriate than the EAW. Such measures include, in particular the European Investigation Order (EIO)⁷.

The EIO can be used for obtaining evidence from another Member State. The EIO covers any investigative measure, with the exception of setting up joint investigation teams. The goal is to allow Member States to request another Member State to carry out investigative measures on the basis of mutual recognition.

Recital 26 of the Directive 2014/41/EU (EIO) states as follows: “With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.”

Article 24 (1) (Hearing by videoconference or other audiovisual transmission): Where a person is in the territory of the executing State and has to be heard as a witness or expert by the competent authorities of the issuing State, the issuing authority may issue an EIO in order to hear the witness or expert by videoconference or other audiovisual transmission in accordance with paragraphs 5 to 7.

The issuing authority may also issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission.

Points for discussion:

- 1) In your Member State, would it be possible to issue/execute an EIO for the purpose of hearing a person by videoconference as a defendant in his or her trial?
- 2) In case the answer to question 1 is “no”, what would be the most suitable/sufficient way of hearing the suspect if issuing an EAW would not be considered proportionate by the issuing state?
- 3) In case the answer to question 1 is “yes”, would the accused person be allowed also to hear the other evidence presented for or against him in the hearing? If not, would it be in line with all the requirements of a fair trial, if the accused person would not be allowed to be present throughout the whole trial (via video)?
- 4) Do you consider that the use of videoconference hearing might decrease the number of convictions in absentia (and thus reduce the problems of executing EAWs, e.g. the different understanding in Member States of “being summoned in person”)?

⁷ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

IV. THE PROSECUTOR AS AN ISSUING JUDICIAL AUTHORITY AND THE REQUIREMENT OF AN EFFECTIVE LEGAL REMEDY

On 27 May 2019 the Court of Justice of the European Union delivered judgments in the Joint Cases C-508/18 and C-82/19 PPU⁸ and Case C-509/18 PF⁹. All three cases concern the question, whether a public prosecutor is a judicial authority within the meaning of Article 6(1) of the EAW FD.

Furthermore, the CJEU also considered, what effect should be given to the possibility to legally challenge the prosecutor's decision to issue an EAW and particularly, in relation to the proportionality of such a decision.

At the moment there are a number of cases pending in the CJEU (i.e. C-566/19, C-625/19 PPU, C-626/19 PPU and C-627/19 PPU) in which the CJEU is expected to further elaborate on the concept of “effective judicial protection” with regards to situations where under the law of the issuing state a public prosecutor is the “issuing judicial authority” (Article 6(1) EAW FD).

Following the CJEU's judgments issued on 27 May 2019 Eurojust launched a Questionnaire on the impact of these judgments and prepared a compilation of replies¹⁰. The Eurojust compilation, together with the individual notes from the Member States on the independence of the Prosecution Offices, were timely published on the EJM website for reference. As follow-up actions, at the COPEN Meeting of 19 June 2019, Eurojust was given a mandate to update, where necessary, its Compilation, in close coordination with EJM and Council Secretariat. The compilation will henceforth be a joint Eurojust/EJM document.

Depending on the outcome of the pending proceedings, it is clear that many legal and practical questions will arise regarding the existence of court proceedings in relation to the decision of the prosecutor to issue an EAW. To help clarify such questions it would be useful to update the Eurojust/EJM Compilation (Council doc. 10016/19). For this purpose, the following questions could be presented to the Member states:

1. **[Only for those Member States that confer the competence to issue an EAW to a public prosecutor]** Please specify whether, in your Member State, in accordance with the abovementioned judgments, **the decision to issue an EAW**, and inter alia the proportionality of such a decision, is capable of being the subject of **court proceedings** which meet in full the requirements inherent in effective judicial protection. Please indicate if there are differences in cases where the EAW has been issued for the purpose of prosecution or for serving a custodial sentence?
2. Have judicial authorities in your Member State encountered **problems in the execution of EAWs** due to the lack of a legal remedy consisting of court proceedings against a decision to issue an EAW, as mentioned in the abovementioned judgments? If so, please specify which problems? Were there any cases where your authorities declared EAWs inadmissible for that reason?

⁸ Joined cases C-508/18 and C-82/19 PPU (<http://curia.europa.eu/juris/liste.jsf?num=C-508/18&language=en>)

⁹ Case C-509/18 Minister for Justice and Equality v PF (<http://curia.europa.eu/juris/liste.jsf?num=C-509/18>)

¹⁰ Published as Council doc. 10016/19



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3. In view of a future update of the Questionnaire and compilation of replies on the impact of the CJEU judgments of 27 May 2019 (Council doc. 10016/19), is there **any update/revision** that you would like to make in relation to the reply that you previously provided and/or any additional information that would like to see added in the Compilation?

Point for discussion:

- 1) In relation to the above-mentioned, the EJM Contact Points are invited to give their opinion on whether the above-mentioned questions would be relevant for the practitioners with regard to the issue on the availability of a legal remedy? Furthermore, the Contact Points are invited to propose other questions that may be relevant to the subject.

V. DETENTION CONDITIONS – JUDGMENT OF THE CJEU IN THE CASE C-128/18 (DOROBANȚU CASE)

On 15 October 2019 the CJEU published its judgment in case C-128/18 (*Dorobantu*) regarding prison conditions and EAW proceedings. The Court found that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing state, it must take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies.

Furthermore, the Court stated that for the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

During the 52nd Plenary meeting of the EJM under the Romanian EU Council Presidency in June 2019, the EJM Contact Points already discussed the Advocate General's opinion on the case.

In the conclusions the Contact Points agreed that the current practice shows that the national executing authorities are closely observing the judgment of the CJEU in *Aranyosi* and *Căldăraru* case in requesting supplementary information from the issuing Member State on the detention conditions to which the sought person would be exposed pursuant the surrender.

The Contact Points noted that when the judgment in the *Dorobantu* case is rendered, the question of assurances and detention conditions will have to be reviewed again. It was



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concluded that the EJC will closely follow the developments of the *Dorobantu* case and will assess its impact on the EAW procedures

Points for discussion:

- 1) What possible impact do you foresee and, more specifically, are there any specific difficulties that you may encounter as a result of the *Dorobantu* judgment in your country?
- 2) What information would be valuable for you and your national proceedings that could be added on the EJC website (e.g. national case-law related to detention conditions/ execution of EAWs with special considerations to detention conditions or national guidelines/assessment reports)?

VI. BREXIT AND EAW (if time allows)

According to the Article 185 of the draft withdrawal agreement, the EAW would be valid between UK and EU Member States during the transition period. The member states would however be allowed not to surrender their own nationals if that would be against the fundamental principles of national law.

Points for discussion:

- 1) Do you expect your member state to refuse to surrender nationals to UK after Brexit?
- 2) What factors are expected to be relevant in these deliberations?