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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	52 nd Plenary meeting of the European Judicial Network (EJN) - Conclusions on the role of the EJN in fostering the practical application of the EU mutual recognition instruments

Delegations will find in the Annex Conclusions on the role of the EJN in fostering the practical application of the EU mutual recognition instruments, as resulting from the 52nd Plenary meeting of the European Judicial Network (EJN) (Bucharest, 26-28 June 2019).

52nd Plenary meeting of the EJM**Conclusions on the Panel Discussions****ROLE OF EJM IN FOSTERING THE PRACTICAL APPLICATION OF THE
EU MUTUAL RECOGNITION INSTRUMENTS****I. BACKGROUND INFORMATION**

In its recent [conclusions](#) on ‘Promoting mutual recognition by enhancing mutual trust’, adopted under the Austrian Presidency, the Council acknowledged that the **EJM plays an active role in addressing obstacles for, and identifying best practices in, mutual recognition**.¹ Similarly, the Report by the Romanian Presidency on “the way forward in the field of mutual recognition in criminal matters” presented at the JHA Council on 6 June 2019, reveals a consensus among Member States that the EJM (and Eurojust) has a **crucial role in fostering judicial cooperation in criminal matters**.²

In the mentioned Report, which reflects not only the view of the Romanian Presidency but was also endorsed by a large majority of Member States, it is noted that “*the EJM website has been emphasised as the best place for EU practitioners to find relevant information about mutual recognition instruments*”.³ This was reaffirmed by the Council that invited Member States, in particular, “*to encourage practitioners to use the practical tools for judicial cooperation and the (electronic) forms and certificates of mutual recognition instruments that are available on the website of the EJM, as this may facilitate the application of these instruments*”.⁴

¹ Council Conclusions on mutual recognition in criminal matters ‘Promoting mutual recognition by enhancing mutual trust’ (2018/C 449/02), 13 December 2018, Article 27.

² The way forward in the field of mutual recognition in criminal matters – Report by Presidency, 9728/19, 27 May 2019.

³ The way forward in the field of mutual recognition in criminal matters – Report by Presidency, 9728/19, 27 May 2019.

⁴ Council Conclusions on mutual recognition in criminal matters ‘Promoting mutual recognition by enhancing mutual trust’ (2018/C 449/02), 13 December 2018, Article 12.

In light of the above, the Council **encouraged the EJM “to continue improving its website with practical information on mutual recognition instruments, among other things, since this has proven to be a very helpful tool for practitioners”**.⁵ The Council also invited the EJM “to continue paying regular attention to instruments of mutual recognition in their meetings with practitioners”.⁶

Some mutual recognition instruments are included in the scope of the 9th round of mutual evaluations, as endorsed at the CATS meeting of 13 May 2019⁷, namely Framework Decisions (FD) on **(i) the European Arrest Warrant (FD 2002/584/JHA)**, **(ii) Custodial sentences (FD 2008/909/JHA)**; **(iii) Supervision of probation measures (FD 2008/947/JHA)** and **(iv) Supervision measures as an alternative to provisional detention (FD 2009/829/JHA)**. It should be recalled that the role of the EJM is already cemented in these and other mutual recognition instruments, in assisting the authorities of the issuing State in identifying the competent authority in the executing State.⁸

II. PANEL DISCUSSIONS

The discussion panel focused mainly on the role of the EJM in fostering the practical application of custodial sentences (FD 2008/909/JHA) and on the need for an EU instrument on transfer of proceedings. Other mutual recognition instruments were also touched upon in the discussions.

The panel was composed of the moderator, Mr Johannes MARTETSCHLÄGER, EJM National Correspondent for Austria and two other panellists, Danka HRŽINA, EJM National Correspondent for Republic of Croatia, and Lisette VOS, EJM National Correspondent for The Netherlands. The discussions were supported by other EJM Contact Points attending the meeting.

⁵ *Ibid*, Article 28.

⁶ *ibid* Article 27.

⁷ Document 9729/19, 15 May 2019, LIMITE.

⁸ See Framework Decisions 2002/584/JHA, Article 10(1); 2008/909/JHA, Article 5(4); 2008/947/JHA, Article 6(6); 2009/829/JHA, Article 10(7); 2005/214/JHA, Article 4(5); 2006/783/JHA, Article 4(4); and Directive 2011/99/EU, Article 8(2).

A. OVERALL REMARKS

The panellists admitted that in particular some of the instruments, like the Framework Decision on supervision measures as an alternative to provisional detention (2009/829/JHA) and the Directive on the European Protection Order (EPO) (2011/99/EU) suffer from a general lack of awareness and that its practical use in the context of criminal proceedings until now has been very limited.

It was confirmed what has been concluded in previous EJM meetings that **awareness raising of the instruments** is highly needed:

- ▶ The role of the EJM in fostering the use of the mutual recognition instruments (and improvement of them) was underlined and they should continue to be included in different fora for discussion.
- ▶ Further awareness should be raised in the Member States about the assistance the EJM Contact Points and about what the EJM website can provide to practitioners.
- ▶ Some Member States (MS) have **a central authority competent for issuing and execution of requests in relation to specific instruments**. As these instruments are not used very often, such an authority would become a source of information and knowledge of a particular instrument, which could be a model to be followed also for other Member States. This could further lead to nomination of **specialised EJM Contact Points**.
- ▶ Training on these instruments should be organised at the national and at the EU level with the involvement of the EJM and EJTJ, in accordance with Article 4 of the EJM Decision (Council Decision 2008/976/JHA).
- ▶ Trainings could be of specific nature (e.g., training focused on practical issues that arise in the application of probation and supervision measures). For example, in some Member States, projects are available to increase the knowledge of specific instruments and/or topics.
- ▶ Member States and the EU Institutions should raise awareness to defence lawyers as well as probation officers/ probation services in order to learn about the possibilities that are available.

The **EJN website** was said to be of outmost importance for containing and distribution the information on mutual recognition instruments, including those that are less used:

- ▶ To facilitate the identification of the executing competent authorities, Member States should ensure the continuous update of the EJN Atlas tool.
- ▶ Additional legal and practical information should be added regarding these instruments in the Fiches Belges and in the Judicial Library. These tools must regularly be provided with all relevant documents, in order to give the best possible support to practitioners in handling the instruments.
- ▶ An overview in the EJN website on the different types of supervision measures as an alternative to provisional detention available in each MSs could be considered.

B. SPECIFIC ISSUE RELATED TO FD 2008/909/JHA – CUSTODIAL SENTENCES OR MEASURES INVOLVING DEPRIVATION OF LIBERTY

With regard to the FD 2008/909/JHA, it was stated by the panellists that the definition of “measures involving deprivation of liberty” differs between Member States⁹ - what qualifies as “measures involving deprivation of liberty” in one Member State, might not always correspond to the definition in another Member State. Also, it is very difficult to adapt certain measures in some Member States.

An example of a case explained by a panellist concerned transfer of two persons, who had been sentenced for lifetime imprisonment for aggravated murder in one Member State. The persons were living in two different counties in the executing MS, and as a result two courts were competent to recognize the judgment and to execute the request. For the purpose of the transfer, a judgment was received from the issuing Member State. However, in the executing MS there is no lifetime sentence, but a long term sentence of 40 or 50 years of imprisonment. Furthermore, in line with the law of issuing Member State, the sentenced persons would have a right of conditional release after 15 years; yet in the executing MS there is a right to request release after half of the sentence has been served.

⁹ The Framework Decision does not provide an exhaustive list of measures involving deprivation of liberty. For instance, Article 9(1)(k) notes, indirectly, “measure of psychiatric or health care” as an example of a possible measure in national legislation.

The two courts in the executing MS had a different interpretation on how to recognize the judgment. One of the courts adapted the sentence to a 30 years' imprisonment so that the person could have a right for conditional release after 15 years, in accordance with the law of the executing State. While the other court recognized the same judgment imposing an imprisonment of 40 years stressing that the terms of conditional release proscribed by the law of sentencing state shall be taking into account during the execution of the sentence.

In another case example, a question was raised regarding the adaption of a prison sentence of 6 years for a drug offence. The question at the Court of the executing State was whether it should be verified what this particular crime was according to national legislation, considering that the criminal act did not constitute a drug offence in the executing MS, but smuggling with the maximum penalty of 2 years. The court decided that the *nature* of the crime in the MS where the crime was committed should be considered. So even though the criminal act would not have been a drug offence in the executing MS, the executing Court defined the crime as aggravated drug offence according to its national law and adaptation was not done.

The latter is an example of the executing Member State looking into the legal determination of the crime, rather than the factual description of the behaviour. Other examples were mentioned, where the content of the measure is not similar across all Member State.

The following conclusions were made during the discussions:

- ▶ **Additional legal and practical information** should be added on the EJM website regarding the instrument in the **Fiches Belges tool and the Judicial Library** continued to be provided with all relevant documents, in order to give the best possible support to practitioners in handling the instrument.
- ▶ The **information for the Fiches Belges** could be **gathered through a questionnaire** supported by the EJM and executed in structured and more complete way.
- ▶ Collection of national case law would be of added value; it nevertheless needs to be further analysed what would be the most relevant cases and also the translation issue must be tackled.

- ▶ A possibility to create a section on the EJM website with dedicated information on the respective instrument was proposed, provided that the information can be shared publicly.

C. THE NEED FOR AN EU INSTRUMENT ON TRANSFER OF PROCEEDINGS

Within the EU, there is no consensus regarding the need for an EU Instrument on Transfer of Proceedings.¹⁰ Only 13 Member States have ratified the European Convention on the Transfer of Proceedings (1972).¹¹

The panellists reminded that in 2009, a proposal for a Framework Decision on the Transfer of Criminal Proceedings was issued during the Swedish Presidency in 2009, but no agreement was reached on this initiative launched by 15 Member States. However, practical problems with regard to transfer of proceedings remain. During the panel discussions, the panellists and the Contact Points argued if the existing legal basis for transfer of proceedings is sufficient or there is a need for an EU instrument in this area.

Currently, for transfer of proceedings, the Council of Europe (CoE) Convention 1972 on Transfer of Proceedings or the CoE Convention 1959 on Mutual Legal Assistance, Article 21, are used. Also other Conventions may be used, such as; Benelux Extradition and MLA Convention 1962 (Art. 42); United Nations (UN) Drug Convention 1988 (Art. 8); UN Transnational Organised Crime Convention 2000 (Art. 21) and UN Corruption Convention 2003 (Art. 47). Some Member States also use bilateral agreements concluded with other countries.

Several practical problems were mentioned by the panellists and the Contact Points, e.g. in which phase of the proceedings the transfer should take place and how to avoid breach of the ne bis in idem principle?

- ▶ Article 21 of the Convention on Mutual Assistance in Criminal Matters, Strasbourg, 1959 (“Laying of information in connection with proceedings”) is of general nature and obligations of the requested and requesting Member States as well the consequences of the transfer of proceedings remain unregulated and unclear.

¹⁰ General Secretariat of the Council, “*The way forward in the field of mutual recognition in criminal matters – Replies to the questionnaire*”, 11 March 2019, LIMITE.

¹¹ The following Member States have ratified the European Convention on the Transfer of Proceedings (1972): Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Lithuania, Netherlands, Romania, Slovakia, Spain and Sweden.

- ▶ It is a paradox that it is often more cumbersome to transfer the proceedings to the Member State where the person is living than to issue an EAW, even though the first option would be more effective in terms of the consequences both for the suspect and for the judicial authorities, starting with cost effectiveness.
- ▶ Many times problems with conflict of jurisdiction (relevant provisions of Framework Decision 2009/948/JHA on conflicts of jurisdiction) and with *ne bis in idem* principle occur. For example, with no clear legal consequences regarding transfer of proceedings, there is a risk of uncoordinated parallel proceedings, as it may be that after an exchange of evidence, both involved Member States opt for conducting criminal proceedings.
- ▶ Also the issue of translation of the file is a problem, especially in situations where there are no obligations to translate. Obviously, the file and evidence must be presented in a language that is accepted by the Court of the Member State where the proceedings are conducted.

An example of a case explained by a panellist concerned a case of sexual harassment where both the suspect and the victim were citizens of an EU MS; the victim was a minor. This was a classic example of a situation where transfer of proceedings is used, as the hearing of the victim who lives in the requested state could only be done by the authorities of the requested state. It was therefore necessary to transfer the proceedings to the MS of the victim. However, as the suspect was detained in the requesting State and the requesting MS had not ratified the Convention of Transfer of proceedings of 1972 - which regulates the surrender of the suspect in the framework of the transfer of the proceedings - it was necessary to coordinate the surrender of the suspect using an EAW. This coordination was done by the assistance of EJC Contact Points; Art 21 of 1959 Convention was used for the transfer of proceedings.

The requested state took over the case and immediately issued an EAW. The requesting state dismissed the case to remove this obstacle for surrender and consequently the suspect could be surrendered.

With regard to transfer of proceedings, the Contact Points concluded the following:

- ▶ To clarify the provisions of the European Convention 1972 on the Transfer of Proceedings, the “[Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form](#)” issued by the PC-OC, could be used.
- ▶ **Communication** is instrumental in order to solve any legal and practical issue related to transfer of proceeding, for example to determine in which jurisdiction the proceedings should be conducted. For that matter the **EJN** is in a favourable position and should be used.
- ▶ There was a strong support by the EJN practitioners regarding **an EU instrument with clear rules, when to act, what to do, what information to transmit, in what stage the case should be transferred, what are the legal consequences of the transfer of proceedings in the issuing MS (e.g. to dismiss the case, to discontinue the case etc), , what to do with evidence or frozen assets in the issuing country, issues related to the admissibility of evidence etc.** It was highlighted that such a new instrument might also encourage the use of Supervision measures as an alternative to provisional detention (FD 2009/829/JHA).

A representative from **Eurojust** explained that also Eurojust casework, confirms that the patchwork of legal bases and the absence of a common EU instrument on transfer of proceedings can create practical and legal difficulties. Issues observed by Eurojust are the following:

- ▶ Transfers of proceedings are time consuming in the absence of mandatory time limits;
- ▶ Differences in substantive and procedural criminal laws;
- ▶ Costs related to translation.

Therefore Eurojust supports the Presidency’s view to reassess the need to launch a proposal on transfer of proceedings - in the broader context of parallel proceedings and conflicts of jurisdiction and thus not an instrument that is limited to the framework of EAW procedures - to overcome the current obstacles.

The European Commission appreciated the role of the EJM Contact Points in highlighting legal and practical problems with regard to the existing legal framework and bringing these issues to the attention of the Commission. The Commission admitted that even though several issues may be solved in Eurojust coordination meetings, clear criteria of any issue including in relation to the transfer of proceedings are important. The Commission reminded that in 2009, when the initiative on an EU legal instrument on Transfer of Proceedings was put forward, there was no success in agreeing on the 1) criteria and 2) the consequences of a transfer. The Commission will consider making a new proposal after a thorough assessment and after having consulted with the practitioners.

The Romanian Presidency concluded the discussions by explaining the steps that had been taken so far during the Romanian Presidency in the first half of 2019. Emphasis was put on the conclusions of the Report by the Romanian Presidency on “the way forward in the field of mutual recognition in criminal matters” presented at the JHA Council on 6 June 2019 (referred to above) which included, *inter alia*, the need for an assessment of the provisions of Framework Decision 2009/948/JHA on conflicts of jurisdiction, as this instrument, while being frequently used by some Member States, has not been found useful by other Member States. This could start from a clear assessment in the future of the current caseload of transfers of proceedings and practical application of alternative (non-EU) instruments”, as stated in the Report.