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From: European Judicial Network
To: Delegations
Subject: Presentation by the European Judicial Network (EJN)
- Conclusions from the 51st EJN Plenary meeting (Vienna, November 2018) on the application of mutual recognition instruments

Delegations will find attached conclusions on the application of mutual recognition instruments, as resulting from the 51st Plenary meeting of the EJN (Vienna, November 2018).

51st Plenary Meeting of the European Judicial Network

22 - 23 November 2018 in Vienna

EJN CONCLUSIONS - MUTUAL RECOGNITION INSTRUMENTS

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PART 1: INTRODUCTION

The EJM Plenary Meeting under the Austrian Presidency focused on the implementation and application of EU legal instruments based on mutual recognition and the impact for the Network and its Contact Points as well as practitioners in general. The aim of the discussions was to identify practical problems and possible solutions to six legal instruments that have been less addressed by the EJM. As the EAW and the EIO have been frequently discussed in different other fora they were not included.

In order to enable an in-depth discussion at the Plenary Meeting, the EJM Contact Points were requested to reply to a questionnaire regarding the application of the instruments.

Over a hundred EJM Contact Points from 26 Member States expressed their views and shared their experience. The summarized answers were distributed to the participants before the meeting.

For each of the six instruments the Contact Points were asked whether they have been addressed during their application, either often, rarely or not at all. The results give only an indication on how often these instruments are used in practice. The FD 2008/909/JHA Custodial Sentences was the only instrument for which a majority of Contact Points reported at least some experience, while less than half of the Contact Points had any experience with the FD 2005/214/JHA Financial Penalties. This was followed by the FD 2006/782/JHA Confiscation Orders with more than 2/5 and the FD 2008/947/JHA Supervision of Probation Measures and Alternative Sanctions with less than 2/5 of the Contact Points reporting any experience. Less than 1/5 of the Contact Points have dealt with the FD 2009/829/JHA Supervision Order or the Dir 2011/99/EU European Protection Order, which reflects the rare use of these instruments. There might however be other reasons why the Contact Points are rarely or not at all involved regarding one or more of the instruments. It could for instance be suggested that the instruments work smoothly and without problems that would require the involvement of an EJM Contact Point.

PART 2: GENERAL REMARKS

1. Lack of Awareness

The EJM experts remarked that it is apparent that these legal instruments are not widely known among EU practitioners. The limited knowledge and the consequent lack of practical experience deter the judicial authorities from making use of these legal instruments.

Additionally, the lack of experience of using the instruments leads to delays in their execution. Contact Points reported that due to the limited practice, the competent authorities are not aware of on how to proceed. Therefore, the issuing authorities sometimes have the additional task of providing extra information and even guidance to the executing authority on how to deal with the orders/certificates.

Furthermore, participants reported difficulties to identify the right authority to address the orders/certificates. The need to request information on the competent authorities in the executing state causes additional delays in the process.

Proposed solutions

1.1. Awareness raising and sharing of information

- Member States could provide further information about these instruments on their national intranet pages and share EU or national guidelines, best practices and handbooks to facilitate the issuing and execution of the orders/certificates;
- These instruments should be included in different fora for discussion. For example, at the EJM Plenary Meetings and the EJM National and/or Regional Meetings, where the EJM experts focus on improving the practical application of the legal instruments and share findings with the colleagues in the Member States;
- Since on several occasions it was acknowledged during the discussions that in many situations the EJM could be of assistance (e.g. in relation to providing information on national legislation, speeding up the execution of a request, providing assistance in identifying competent authorities etc.), further awareness should be raised in the Member States about the assistance the EJM Contact Points and the EJM website can provide to practitioners;
- The EJM also proposes to the Member States and the EU Institutions to raise awareness to defence lawyers as the application of some of these instruments could be in the interest of the defendant.

1.2. Trainings

- Training on these instruments should be organised at the national and at the EU level with the involvement of the EJM and EJTJN, in accordance with Article 4 of the EJM Decision (Council Decision 2008/976/JHA);

1.3. Contribution from the EJM

- The EJM should identify obstacles and concrete issues and best practices on solutions, in order to share them with all practitioners in the Member States as well as with the EU Institutions;
- The EJM should participate in the drafting of manuals and guidelines to ensure the practical input of the Contact Points is taken into consideration.

1.4. EJM website

- To facilitate the identification of the executing competent authorities, Member States should ensure the continuous update of the EJM Atlas tool;
- Additional legal and practical information should be added regarding these instruments in the Fiches Belges 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 instruments.

2. Differences between the Legal Systems in the Member States

Differences between the legal systems and the national legislation are an additional obstacle when applying the instruments. For the application of FD 2005/214/JHA on Financial Penalties a number of Member States do not consider certain actions as criminal but administrative offences. When applying FD 2008/909/JHA on Custodial Sentences and FD 2009/829/JHA on Supervision Measures, differences regarding the maximum penalty and different rules on pre-trial detention across the EU require steps of adaptation in the executing state.

It was also discussed that sometimes a lack of clarity of the EU legal instruments and the explanatory reports causes difficulties. This has led to different interpretation in the transposition and the application of the legal instruments. Even within the same country conflicting views were reported. Therefore, the application of the instruments is not consistent throughout the EU.

Proposed solutions

2.1. Involvement of the EJM during the EU legislative process

- The EJM practitioners should be involved in the legislative process of the EU legal instruments in the area of judicial cooperation in criminal matters. The EJM expertise in judicial cooperation provides the practitioners' view and facilitate their implementation and application at a later stage. Therefore, the Plenary Meeting agreed that the EJM should be involved systematically in the EU legislative process from the early stages up to their later evaluation. The involvement of the EJM in the drafting of the certificate for the new Regulation on the mutual recognition of freezing orders and confiscation orders was considered a success improving the practicability of the certificate.

2.2. Executive/Legislative action

- Contact Points experienced that consultations between Member States on practical aspects and/or potentially negotiation of bilateral agreements could facilitate the application of the legal instruments.
- It was also suggested that the revision or amendment of the national legislation could take place to integrate the different needs from practitioners.

2.3. Assistance from the EJM

- Consult the EJM Contact Points or the EJM website to obtain information on how the process works in the different Member States.
- Use the forms for the orders/certificates or the EJM Compendium tool and other information available in the EJM Judicial Library.
- Promote meetings between the EJM Contact Points and involvement of the EJM Contact Points and other practitioners in relevant meetings, trainings and relevant discussions in order to improve mutual understanding and mutual trust between the Member States and consequently to overcome national differences.

3. Filling in the order/ certificates

There is a lack of clear and common understanding on how to fill in the certificates/orders, which leads to difficulties and delays in the execution of them. In particular FD 2008/947/JHA on Probation Measures and FD 2005/214/JHA on Financial Penalties were mentioned, but this is relevant for all instruments.

Further to that, finding the competent authorities in the executing state is sometimes difficult.

Proposed solutions

3.1. Assistance from the EJM

- It is advisable to consult the EJM Contact Point in the executing Member State in case of doubt regarding the legal requirements and practice of that Member State.

3.2. Trainings

- Relevant trainings (see: Part 1 Point 1.2) should include also workshops, simulations, or other form of technical assistance on how to fill in orders/ certificates.

3.3. EU Handbooks

- Issuing Handbooks at the EU level promotes a common understanding of how the certificates/orders should be filled in.

PART 3: INSTRUMENT-SPECIFIC REMARKS

I. FD on mutual recognition of custodial sentences or measures involving deprivation of liberty (2008/909/JHA)

1. Adaption of the sentence

Art 8 FD 2008/909/JHA provides for an option for the executing Member State “*to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law*”. The Discussion Panel focused on how to adapt the sentence in line with Art 8 of the FD to national legislation – whether the “calculation” should be based on the particular crime in question (*in concreto*) or on the whole category of crimes e.g. drug crimes (*in abstracto*).

Solution proposed: Calculation *in concreto* according to Art 8 of the FD

- Contact Points agreed that the Member States should avoid adapting the sentence in a way, which would cause the issuing Member State to withdraw the request.
- Contact Points stated that the executing state should calculate the penalty following the ascertained facts of the case (*in concreto*), with the possibility to reduce the penalty in cases foreseen in Art 8 para 2 of the FD. This issue with the adaption of the sentence should be mentioned in the EU Handbook on the instrument.

2. Imprisonment in Lieu of a Fine

Replies from the EJM Contact Points revealed that most Member States would be able to enforce the imprisonment in lieu of a fine under the FD 2008/909/JHA; however, there were also views of some Contact Points that it is not possible to enforce the sentence under FD 2008/909/JHA. Some argued that only Art 10 of the FD 2005/214/JHA on Financial Penalties applies. In some cases, the enforcement is prevented by the national law limiting the length of imprisonment in lieu of a fine.

Solution proposed: sharing information

Consider if it is useful to share information on which Framework Decision is applied in each Member State on the EJM website.

3. Minor custodial sentences summing up to a custodial sentence of at least 6 months.

Some Contact Points reported that the enforcement of a sum of minor sentences would be refused under Art 9.1(h) of the FD 2008/909 /JHA, as the 6 months minimum period is calculated for each sentence separately. However, most of the Contact Points replied that enforcement is possible even if several minor sentences would have to be added together to reach a total sentence of at least 6 months. In some MS this is only possible if the minor sentences are joined or connected with each other.

Solution proposed: for the Courts to decide

It is for the National Courts and ultimately for CJEU to interpret.

II. FD on mutual recognition of supervision of probation measures and alternative sanctions (2008/947/JHA)

4. Execution of certain probation measures

The Discussion Panel addressed problems in relation to the execution of certain probation measures, such as health related measures (treatment of a drug addict). The majority of the Contact Points see both the treatment as an out-patient and the hospitalisation as falling under the scope of FD 2008/947/JHA, whereas others would apply the FD 2008/909/JHA, especially in the case of hospitalisation. According to some Contact Points, execution is not possible for these types of measures.

Some Member States face difficulties in providing certain kind of treatments. For example, one Member State stated that it does not have a specialized psychiatric facility and therefore cannot execute such a measure.

5. Community Service

3/5 of the Contact Points replied that community service is an alternative sanction according to national law, whereas 1/3 replied that it is considered a probation measure and the rest stated that both options are available.

Solutions proposed: sharing information

- Discuss whether additional information on the EJN website on what probation measures and alternative sanctions are available could be considered useful: and if yes, in what form (e.g. in the Fiches Belges) and to what extent.

III. FD on mutual recognition to decisions on supervision measures as an alternative to provisional detention (2009/829/JHA)

6. Lack of knowledge about supervision measures

The Discussion Panel addressed several issues caused by the lack of knowledge about supervision measures within the Member States both as an issuing and as an executing Member State. Several issues were mentioned such as applying a more severe supervision measure than foreseen by the issuing Member State; adapting/ leaving out measures (without consultation) as well as confusion about the types of measures as listed in Art 8.1 FD 2009/829/JHA. (Such as “to remain at a specific place” (c) and “limitations on leaving the territory” (d)). Also, especially in serious crime cases, certain reluctance appears in the Member States to release the person due to lack of confidence that the person finally appears in the court.

Solution proposed: Awareness raising and sharing of information

- Introduce this “new” form of cooperation in EJN meetings (plenary meetings, regional and national meetings).
- Discuss whether an overview on the different types of supervision measures as an alternative to provisional detention available in each Member State on the EJN website could be considered useful: and if yes, in what form (e.g. in the Fiches Belges) and to what extent. Creation and promotion of national handbooks/ guidelines on the instrument

7. Consent of the person concerned

In cases where the person has already returned to the executing state and the issuing state requests a supervision measure instead of issuing an EAW, the question is how the consent of the person for the supervision measure can be obtained. This causes problems in practice as the national legislation in most Member States requires a hearing in court to obtain consent.

Solution proposed: review the national implementation

- Contact Points suggested that Member States could improve the national system by allowing to receive the consent through other channels i.e. that the hearing takes place by video conference.

IV. FD on mutual recognition to Financial Penalties (2005/214/JHA)

8. Proportionality of the costs involved

The Discussion Panel addressed the relationship between the cost of recovering a low value financial penalty for minor crimes and the costs and time needed for the execution.

Solution proposed: Review the National Implementation

- Contact Points suggested that Member States should improve the system to collect the financial penalties to improve the speediness and lower the costs of the process.
- Additionally, Member States should consider the proportionality of the process involved before issuing a certificate.

9. Double Criminality

The FD 2005/214/JHA provides a list of crimes where there is no need to check for double criminality which in many cases concern serious crimes. However, for the criminal conducts that are outside of the scope of this list, the panellists found that financial penalties are usually imposed for minor offences, so in many cases the conduct is not considered criminal, but only administrative in the executing state, which prevents the execution in some Member States. There are different views whether administrative penalties can be recognized under this FD, but most Member States are able to do so.

Solution proposed: Sharing Information

Sharing information about the legal classification of the offences (e.g. via direct contacts or on the EJN website).

10. Statutory Limitation

The FD deals often with minor offences which in many Member States carry a short statute of limitation. This leads to refusal if there are any delays in receiving or recognizing the certificate.

Solution proposed: Sharing Information

Discuss whether information about short statutes of limitation on the EJN website could be considered useful in order to assist the issuing authorities in sending certificates in time: and if yes in what form (e.g. in the Fiches Belges) and to what extent.

V. FD on mutual recognition of confiscation orders (2006/783/JHA)

11. Identification and Tracing of Assets

Practitioners found difficulties with identifying and tracing of the assets. As in many cases the judicial authorities do not have a detailed description of the assets involved, they cannot provide this information in the certificate. Hence, practitioners questioned if it would be necessary to complement the Confiscation Order with an EIO/MLA inquiring on the identification/tracing of the assets.

Furthermore, to ensure the success for the confiscation of the assets once identified, panellists also advised that a Freezing Order should be issued first. The main reason explained is that the Confiscation process requires a notification to the persons involved before its execution. Consequently, there is a risk for the removal of the assets before confiscation can be effected.

Solutions proposed: Intensify cooperation between judicial authorities and law enforcement authorities

- Judicial authorities should work in cooperation with the law enforcement and administrative authorities in the Member States to facilitate the tracing and identification of assets.
- Complementary use of EJN/CARIN: The EJN and CARIN Networks could assist practitioners by providing them with information on the national application of this legal instrument.
- Joint training between the judicial and law enforcement authorities should be organised by the national training institutes and at EU level with the support from EJN, EJTN and CEPOL.

12. Freezing of assets during the execution of the sentence phase

Contact Points raised an issue that they face in several occasions; the impossibility to request the freezing of the assets once the criminal procedures reached the final verdict. During the execution of the sentence it is not possible to request the freezing of any assets, only confiscation directly. This prevents the judiciary in many cases to obtain successful recoveries.

Solution proposed: Review national/ EU Legislation

- The Member States are encouraged to amend their national implementing legislation where relevant.
- Contact Points would suggest to the EU Institutions to close this gap with legislation that provides for the possibility to request the freezing of assets during the process of the execution of the sentence.

VI. *Directive on the European Protection Order (EPO) (2011/99/EU)*

13. Reception and execution of an EPO

Apart from addressing the issues in relation to the transmission of an EPO from the issuing Member State to the executing Member State and difficulties in the identification of competent authorities (See: Part 2), the Discussion Panel highlighted that the practitioners are not very familiar with several aspects regarding reception and execution of the Order. It was mentioned that there seems to be uncertainty about how to register an EPO in the national case management system and that local authorities are not familiar with this instrument. These difficulties arise because the EPO is a wholly new instrument and unlike the other mutual recognition instruments does not replace or is based on older forms of mutual legal assistance.

Some Member States have assigned the civil courts as competent authority for this instrument. This double civil/criminal competence of the instrument makes the execution of it more complex and difficult.

Several Contact Points expressed doubts as to the usefulness of the instrument; the need for protection ceases when the concerned persons are in different Member States, there is a potential overlap with other instruments (FD 2009/947 and FD 2009/829).

Solution proposed: Awareness raising

- Encourage the introduction of this new form of cooperation in EJM meetings (plenary meetings, regional and national meetings).
- Continuous training and encouraging direct contacts between judicial authorities

CONCLUSIONS ON THE ROLE OF THE EJM

The 51st Plenary meeting on the Contact Points of the European Judicial Network (EJM) identified various areas where the EJM could be of assistance when it comes to the practical application of the existing Mutual Recognition Instruments as well as to development of new instruments.

The EJM meetings are key fora to discuss issues on the interpretation and application of the EU legal instruments. Therefore, the **EJM should continue promoting through its Plenary as well as Regional and National Meetings** the discussions on the different legal instruments to raise awareness and strengthen the understanding of them in the Member States.

Trainings/ simulations/ workshops on the Mutual Recognition Instruments should be organised by the national institutes and at the EU level with the involvement of the EJM and EJMN respecting article 4 of the EJM Decision (Council Decision 2008/976/JHA). The trainings should be held with the involvement of the EJM Contact Points as trainers and experts due to their knowledge and expertise on international judicial cooperation.

Since on several occasions it was acknowledged during the discussions that in many situations the EJM could be of assistance (e.g. in relation to providing information on national legislation, speeding up execution of a request, providing assistance at identifying competent authorities etc.), **awareness on the EJM** should be raised in the Member States, on the assistance the EJM can provide the practitioners with and on the EJM website and its tools.

The discussions revealed that there continues to be **lack of mutual trust between the Member States**. It is therefore of utmost importance to promote meetings between the EJM Contact Points and involvement of the EJM Contact Points and other practitioners in the field in relevant meetings, trainings and discussions in order to improve mutual understanding and mutual trust between the Member States and consequently to overcome national differences in a more efficient manner. Further to that, best practices should be identified in order to share them with all practitioners in the Member States as well as with the EU Institutions. EJM Contact Points should participate in the drafting of manuals and guidelines to ensure the practical input of the Contact Points is taken into consideration.

The EJM website, a highly important source of information on Mutual Recognition Instruments and a platform for valuable e-tools that facilitate judicial cooperation in the EU, should be even more promoted, as to facilitate the identification of the executing competent authorities of Member States and to find the relevant information for the practical application of the instruments. Therefore, continuous update of the EJM Judicial Atlas should be ensured. Also, additional information should be provided regarding the instruments in the Fiches Belges and in the Judicial Library in order to give the best possible support to practitioners in handling the instruments.

Finally, it was established that the EJM practitioners should be **involved in the legislative process of the EU legal instruments** in the area of judicial cooperation in criminal matters. The EJM expertise in judicial cooperation provides the practitioners' viewpoint that facilitates their implementation and application at a later stage. Therefore, the EJM should be involved systematically in the EU legislative process from the early stages up to their later evaluation. The involvement of the EJM in the drafting of the certificate for the new Regulation on the mutual recognition of freezing orders and confiscation orders was considered a success improving the application of the legal instruments.

