The EAW and Prison Conditions

Outcome report of the College thematic discussion

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Delegations will find attached an Outcome Report of the College Thematic Discussion on the EAW and Prison Conditions.

INTRODUCTION

On 14 February 2017, the College of Eurojust held a thematic discussion on *The EAW and Prison Conditions.* The Thematic Discussion was chaired by Klaus Meyer-Cabri and was attended by representatives from the National Desks and the Administration of Eurojust. The College also welcomed Mr Kasper van der Schaft and Mr Jan Jippe Arends from the Public Prosecution Office in Amsterdam, who actively participated in the discussion.

The objective of the Thematic Discussion was to exchange experience and ideas among National Desks on EAW cases in which judicial authorities experienced difficulties with the execution of EAWs due to allegedly inadequate prison conditions in the issuing Member States. During the Thematic Discussion, participants referred to the *Aranyosi and Căldăraru* judgement and its impact in national cases. They exchanged experience and best practice, and looked at prospects for further Eurojust support to national practitioners.

This outcome report summarises the main issues discussed during the Thematic Discussion.

NO BLAMING OR SHAMING

During the College Thematic Discussion, the Chair emphasized, from the very beginning, that the approach of the meeting was to abstain from '*blaming or shaming*' specific Member States. On the basis of case law from the European Court of Human Rights (ECtHR) and CPT Reports, the issue of prison conditions can clearly potentially affect each Member State either as issuing and/or executing authority. Therefore, reflection *together* on potential solutions to situations with which *each* Member State can be confronted was considered important.

Some participants explained that their respective national authorities or ministries sometimes felt humiliated when they were asked to 'guarantee' that a specific prison comply with minimum European standards. Participants discussed and concluded that the exchange of information should, under no circumstances, be seen as a degrading exercise, but as an attempt to ensure a human-rights-compliant surrender. The use of the word 'assurances' or 'guarantees' might have, for some, a negative connotation, and perhaps speaking in more neutral terms of 'request for supplementary information' would be preferable. This approach would also be more in line with the *Aranyosi and Căldăraru* judgement, in which the Court of Justice clearly abstains from taking over the term 'assurances' as mentioned by the referring national court and uses, in line with Article 15(2) EAW FD, the wording 'supplementary information'. For this reason, this outcome report will use the term 'supplementary information' rather than 'assurances' or 'guarantees'.

Some participants also expressed their concerns about possible polarisation, whereby the European Union is divided into two types of Member States, namely 'good prison' Member States and 'bad prison' Member States, potentially leading to 'prison shopping'.

REQUESTS FOR SUPPLEMENTARY INFORMATION

A significant portion of the Thematic Discussion was devoted to the question of which type of information should be requested in cases of 'a real risk', and how this information should be assessed.

Different approaches - The discussion paper for the Thematic Discussion indicated that national judicial authorities across Europe have different approaches with regard to the type of supplementary information that is requested (by the executing authority), the type of information that is sent out (by the issuing authority) and the type of information that is considered sufficient to discount the existence of a real risk (by the executing authority). This diversity was confirmed during the Thematic Discussion. Several participants expressed their belief that the exchange of national case law via Eurojust would be beneficial, so that national authorities could learn from their colleagues abroad and understand better how they interpret certain issues. Moreover, for Eurojust to make this case law available to the national authorities whenever Eurojust's specific support is requested by the national authorities was considered useful.

Minimum threshold – Several participants underlined that, despite different national approaches, the *Aranyosi and Căldăraru* judgement makes clear that the required threshold should be the European minimum standard. Therefore, a common understanding on this minimum standard is important. Despite an extensive number of judgements from the ECtHR, national authorities sometimes still struggle with a correct and uniform interpretation/application. For instance, the available number of individual square metres in multi-occupancy cells is an issue that still triggers discussion in several Member States. While, according to ECtHR case law, cells offering less than three square metres of personal living space to each occupant give rise to a strong presumption of violation, this same case law acknowledges that this presumption is rebuttable. Some authorities wondered what would suffice: Under what circumstances would less than three square metres be sufficient? Are three square metres always sufficient? During the Thematic Discussion, participants underlined that in situations in which the available square metres per individual are less than three, supplying supplementary information that can potentially rebut the presumption of a violation of Article 3 ECHR is important, namely information on the general conditions of the cell (e.g. direct access to daylight, possibility of natural ventilation, individual toilet), as well as information on the type of prison regime that is applicable (closed; semi-open; open), and on the possibility for outdoor activities.

Challenging issues – While some national authorities still struggled with the issue of the number of square metres, others said that the major difficulty in relation to prison conditions is connected to other issues, such as safety, health treatment and equality within prisons (particularly non-discrimination on the basis of sexual orientation).

Dialogue – Participants underlined the importance of dialogue among authorities and said that **coordination meetings** organised by Eurojust were excellent tools to foster trust and reach satisfying solutions (*see also* discussion paper). During the Thematic Discussion, reference was also made to a study visit by a small delegation of judicial authorities from Member State A, who toured a prison in Member State B and learned that convicted persons in Member State B first spend one-fifth of their sentence in a closed regime, in which a minimum personal space of three square metres is guaranteed, and later are transferred to a semi-open regime, in which a minimum of three square metres is not guaranteed, but the prisoners spend very little time in the cell during the day and are allowed to do meaningful outdoor activities. The study visit allowed a better understanding of how prison conditions that apply in Member State B can be different from prison conditions in Member State A, but not necessarily violate Article 4 of the Charter of Fundamental Rights of the EU. The direct contact between the authorities of both Member States enabled a better understanding of each system and also a better understanding of the type of information that should be provided. Description of such incarceration situations by the issuing authorities was considered very important. Equally important is that the incarceration situations are duly taken into account by the executing authorities when deciding on the execution of the EAW.

Templates with structured information – In view of different approaches and difficulties in identifying the minimum standard, some participants suggested that Eurojust could perhaps create a document/template containing the type of information that could be requested, depending on the specific circumstances of the case. Both the request and the reply must be sufficiently specific. For instance, the supplementary information that will be requested, if a 'real risk in relation to medical treatment in prisons' occurs, will logically be different if a 'real risk in relation to overpopulation' exists. Some participants shared information on how the requested information should appear. One of the participants shared an example of supplementary information that had been provided, successfully, by his Ministry of Justice. The representatives from the Public Prosecution Office in Amsterdam also shared useful information indicating the type of additional information that they request, including an explanation of how the presumption can be rebutted in light of ECtHR's case law. Both examples contain relevant criteria for the development of future templates.

Competent authorities – Participants underlined that Member States have the freedom to decide which authority is competent to provide supplementary information. The *executing* authority does not decide which authority from the *issuing* Member State should provide the information.

DEADLINES AND DELAYS

Participants discussed and concluded that requests for supplementary information on prison conditions can considerably delay the surrender procedure. In several cases, the deadlines provided for in Article 17 EAW FD could not be met. Participants concluded that national authorities should be reminded of their obligation to inform Eurojust under Article 17(7) EAW FD.

SOLUTIONS IN THE EVENT OF THE NON-EXECUTION OF AN EAW

Participants discussed and agreed that ensuring good prison conditions is, primarily, a responsibility for the Member States. One participant explained that its Member State has made a considerable investment in new prison infrastructure and that it probably has some of the most modern prisons in the European Union. Another participant shared a different experience, and explained that, with limited resources, its Member State is struggling to address this issue.

Participants underlined that, as long as all prison conditions do not meet the required standards, reflection on alternative solutions if an executing authority cannot discount the existence 'real risk' after he/she receives the supplementary information is important. Participants recalled that preventing the risk of impunity is an important objective in the European Union, and struggled with the idea that requested persons would simply be released.

A distinction was made between an EAW for prosecution (if the requested person still benefits from the presumption of innocence) and an EAW for the execution of a sentence (if the person has been convicted, potentially for a very serious offence).

For the first scenario, participants considered that a transfer of proceedings could be a possible solution to avoid the release of the requested person. However, some participants said that the mere finding that prison conditions are poor in the other Member State is not a sufficient legal basis in its Member State to take over proceedings. Other participants agreed that a decision on transfer of proceedings will depend on many different factors, including the legal framework in the Member State concerned.

For the second scenario, participants discussed the application of the FD on transfer of sentenced persons (FD 2008/909/JHA), but realised that this instrument might not always be applicable in view of the specific criteria included in this instrument, particularly regarding 'reinsertion' and/or 'consent' (Article 4 of the EAW FD). Therefore, one of the participants suggested that the EU legislator might need to consider revising the EAW FD, for instance, by revising Article 4(6) EAW FD as follows:

> *'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; as well as when the executing authority finds substantial grounds to believe that the requested person, if surrendered to the requested Member State, will be exposed to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the EU, and that executing Member State undertakes to execute the sentence or detention order in accordance with its domestic law'*

By imposing an explicit obligation on the executing authority to execute the sentence itself, the legislator would ensure better compliance with the objective of preventing the risk of impunity. Another participant argued, however, that such an approach might lead to situations in which Member States will be less encouraged to resolve their internal problems with prison conditions if they are confident that other Member States will take over the execution.

CONCLUSIONS AND FOLLOW-UP

First, participants discussed requests for supplementary information in relation to prison conditions and looked at the possible role Eurojust could play. All participants agreed that Eurojust could assist in liaising between the competent authorities, and in facilitating and speeding up surrenders via level II meetings and/or coordination meetings. Some participants suggested that the continuous exchange of relevant national case law via Eurojust could be useful for practitioners to see how courts in other Member States address certain issues. Other participants suggested the development of templates for requests for additional information.

Secondly, participants concluded that requests for additional information often caused delays, and that national authorities should comply with their duties under Article 17(7) EAW FD by notifying Eurojust if and why they cannot meet deadlines.

Finally, participants concluded that, to avoid impunity, reflecting upon possible solutions in the event of non-execution of EAWs, is important. Participants discussed the transfer of proceedings and the transfer of sentenced persons, and concluded that such tools may be useful in some cases, but, due to specific legal criteria, definitely not in all cases. According to some participants, legislative changes might need to be considered at some stage.

Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, Netherlands
Phone: +31 70 412 5000 - E-mail: info@eurojust.europa.eu - Website: www.eurojust.europa.eu

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