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NOTE

from : Council General Secretariat
to : Delegations
Prev. doc.: 17308/08 COPEN 254

Subject : Summary of the answers given in reply to the questionnaire on the situation where several Member States have jurisdiction to conduct criminal proceedings for the same facts of an alleged criminal offence

Delegations will find attached a summary by the Council General Secretariat of the answers given by Member States (17308/08 COPEN 254) in reply to the questionnaire set out in 14124/08 COPEN 187.

Any comments or observations regarding this summary can be addressed to
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Summary of answers given by Member States

1/ Have any cases been noted by your judicial authorities in recent years in which it was discovered that criminal proceedings were being or had been conducted in another Member State concerning facts for which criminal proceedings also were being or had been conducted by your judicial authorities?

Most delegations either replied positively to this question ("yes") or did so implicitly by immediately answering question 1.a below. However, LT and MT explicitly stated that no such cases had been noted. ¹

a) Can you say approximately how many of such cases have occurred over the last five years?

Various delegations observed that no statistics were kept on this issue. The delegations that were able to provide an (estimated) answer, gave quite differing indications, ranging from "a very limited" number (DK), "a few cases" (BE, DE, AT), and "a handful of times" (UK), to "a number of cases" (LV) and "numerous cases" (CZ, EL). Some Member States provided numbers: "at least 2" (ES), "10 cases" (BG ²), "at least 13 cases" (PT), 30-40 (PL), approximately 50 (HU ³), 50-75 (SE ⁴), "approximately 1300" (SI ⁵), presumably 3000 cases (SK ⁶).

¹ FI equally stated that no such cases had been reported, but added that possible conflicts of jurisdiction have already been identified in the pre-trial phase through international cooperation.

² BG reported as follows: "In 2007-2008 10 cases of parallel proceedings were registered; 6 cases of transfer of criminal proceedings from the Republic of Bulgaria to another country and 22 cases of transfer of criminal proceedings from another country to the Republic of Bulgaria were registered as well".

³ "approximately ten times a year", HU specifying that this figure related to the administration of the EAW only.

⁴ "10-15 ... cases ... every year".

⁵ "In [the] last five years (2004 - Nov. 2008) we have [received] approximately 1300 request[s] for cession or acceptance of criminal proceedings from other Member States, but SI does not have data how many such cases related to this question have been noted in last five years."

⁶ "we could presume 600 cases per year".

b) At what stage of criminal proceedings were the above mentioned cases/situations identified, and how?

Member States reported as follows:

When:

- Mostly: "during the pre-trial stage" ("in the course of the preliminary investigation")
- Also: "during the trial stage" (including the phase of enforcement of the sentence).

How:

- Through the suspected person (who may invoke the "ne bis in idem" principle) or his lawyer;
- Through police or customs channels;
- Through the issuing or execution of an EAW (or extradition request);
- From incoming mutual legal assistance requests;
- Through the SIS;
- From various other (direct) contacts with competent authorities in other States;
- From documents or other evidence in the file;
- From particulars provided by the injured party or the informant;
- Through Eurojust.

c) What criteria have Member States used to establish their competence to conduct criminal proceedings in such cases (e.g. territoriality principle, interest of the person accused/victim, interest of social reintegration of perpetrator of the offence, interest of the State, suitability for conducting criminal proceedings, etc.)?

Member States mentioned various criteria to establish their competence¹, of which many are related to each other:

¹ UK observed that it would be more precise to speak of "criteria used to resolve *jurisdictional conflicts*, i.e. how to decide where proceedings can best be brought".

- The offence has been committed entirely or partly on the territory of the State concerned (territoriality principle); (BE, CZ, DE, EL, ES, FR, HU, NL, AT, PL, PT, SI, SK, FI, SE, UK)
- The offence has been committed on board a vessel flying under the flag of the State concerned, or on an aircraft registered in that State; (DE, FR)
- The suitability for the State concerned to conduct the investigation and criminal proceedings, taking into account *inter alia* the state of those proceedings; (BE, DE, ES, LV, FI, SK, FI)
- The practical possibility for the State concerned to conduct the investigation and criminal proceedings; (DE, PL)
- The interest and strategy of the investigations ongoing, in order to ensure the most success in the States concerned; (PT)
- Interests of justice; (UK)
- The nationality of the suspect / accused person (active personality principle); (BE, BG, CZ, DE, FR, HU, NL, AT, SK, SE)
- The place of abode of the suspect / accused person; (DE, SK)
- Interest of the suspect / accused person; (DE, ES, PL, FI)
- Interest of social reintegration of the perpetrator; (DE, ES, SK)
- The nationality of the victim(s) (passive personality principle); (BE, BG, DE, FR, AT, SK, SE)
- Interest of the victim (s); (DE, ES, PL, SK, FI)
- The possibility and proportionality of extradition; (DE, SK)
- When the extradition of the accused person has been refused and the offence(s) can be tried in the State concerned; (DE, FR, SK)

- The availability of evidence or witnesses; (DE, SK)
- Economic reasons (e.g. all witnesses are residents of another State); (SK)
- Public interest / Interest of the State; (DE, ES, PL, SK, FI)
- The offence concerns domestic legal interests / endangers the fundamental interests of the State (high treason, espionage, sabotage, acts endangering external security, etc); (DE, FR)
- The offence is covered by universal or quasi-universal jurisdiction; (FR, SK)
- The offence is classified as a serious specific offence (such as terrorism, war crimes); (NL)
- The offence is committed against certain internationally protected legal interests (such as assaults against air and sea traffic). (DE)

d) How were such cases/situations resolved?

Member States that replied to this question generally observed that such cases/situations were solved through (direct, informal) contacts between the competent authorities of the States concerned, sometimes through liaison officers or with the help of EJM contact points. Some Member States mentioned that Eurojust had assisted in resolving certain cases/situations.

i) Did the judicial authorities of your or another Member State request additional information on criminal proceedings in progress or criminal proceedings completed on the territory of another State?

Member States that replied to this question generally gave a positive answer ("yes"). Some Member States mentioned that such requests were made informally, others indicated that (official) MLA requests / rogatory letters were used in this context.

ii) Were any steps taken to reach an agreement between the judicial authorities concerned whereby criminal proceedings would be conducted only in one State? If so, what steps have been taken and with what result? Are you aware of judicial authorities making efforts to have criminal proceedings concentrated in a single State?

Replies by Member States vary widely on this question. Some mentioned "no" (no steps were taken to reach agreement), some mentioned "yes" (one or more steps were taken to reach agreement).

Some Member States provided examples of cases whereby agreement was reached between the judicial authorities concerned with a view to conducting the criminal proceedings in one State only.

Various Member States underlined that the cases/situations are dealt with on a case-by-case basis, depending on the results of the (direct) contacts between the competent authorities of the States concerned.

iii) Have there been cases where Eurojust has been contacted with requests for help or consultation? If so, what was the result of involving Eurojust in such a case?

BE, BG, CZ, DK, DE, ES, FR, PT, FI, SE and UK reported that they / their competent authorities had involved Eurojust in cases of conflict of jurisdiction. The other Member States either reported that they / their competent authorities had not involved Eurojust, or that they had no information on this issue.

The Member States that had involved Eurojust generally expressed a positive view on the assistance provided by this organisation. Some made comments such as "the intervention of Eurojust proved to be helpful" or "Eurojust helped to resolve the case".

iv) Did any particular problems arise in these cases (e.g. insufficient information from the other State, unwillingness to communicate, etc.)? If so, please specify.

While some Member States reported that they had not encountered any particular problems, most Member States indicated that they had experienced such problems. These can be classified as follows:

- Reluctance / Refusal to provide a reply to a request for information;
- Long delays in obtaining a reply to a request for (additional) information;
- The reply given did not contain the information requested, or contained insufficient information;
- Insufficient exchange of information, sometimes caused by unwillingness ¹;
- Language barriers;
- Inability to gather evidence;
- Non-feasibility to disclose information in a specific stage of proceedings;
- Unwillingness to open criminal proceedings (even when the Member State concerned seemed the most suitable one) / No initiative taken to proceed with the proceedings;
- Reluctance from a judicial authority to give in jurisdiction in favour of another judicial authority.

e) How do your judicial authorities deal with cases where they receive an European arrest warrant and in the course of the surrender procedure they ascertain that the person whom the European arrest warrant concerns is being prosecuted in your State for the same facts for which the European arrest warrant was issued?

Member States reported as follows:

¹ In this context, BE observed that "it would be essential to create a systematic system in view to ensure this exchange of information".

□ *this consideration constitutes obligatory grounds for refusal of an European arrest warrant. After the European arrest warrant has been refused for this reason, is there any obligation or recommendation for the judicial authority concerned to contact the judicial authority that issued the European arrest warrant and resolve the conflict of jurisdiction with it? Have such cases yet been resolved in practice?*

This situation applies to CZ, EL ¹, HU, AT ², SK and UK.

□ *this consideration constitutes optional grounds for refusal of an European arrest warrant. After the European arrest warrant has been refused for this reason, is there any obligation for the judicial authority concerned to contact the judicial authority that issued the European arrest warrant and resolve the conflict of jurisdiction with it? Have such cases yet been resolved in practice?*

This situation applies to BE, BG, DK, DE, EL ³, ES, FR, LV, LT, MT, NL, AT ⁴, PL, PT, SI, FI and SE.

DE and LV mentioned situations/cases reported by their judicial authorities in whom execution of an EAW was refused on basis of the optional ground for refusal.

In general, as regards both options, it was observed that there is no obligation for the executing authority to contact the issuing authority in order to resolve the jurisdiction matters. In practice, however, the executing authority may take such contact.

¹ In respect of own nationals.

² In respect of own nationals.

³ In respect of others than own nationals.

⁴ In respect of others than own nationals.

For example, LV pointed out that its competent authorities usually get into contact with the issuing State before refusing execution in order to decide whether it is better to let the other country perform the proceedings or to continue them domestically. BE also stated that it seems logical in practice that the district which prosecutes the person concerned enters in contact with the issuing authorities with a view to resolving the case.

DK, referring to Article 17(6) of the Framework Decision on the European arrest warrant (according to which reasons must be given to the issuing Member State for a refusal to execute an EAW), observed that if its authorities [intend to] refuse to execute an European arrest warrant on the grounds that the person is being prosecuted in Denmark for the same facts, a close contact between the competent authorities in the issuing State and the Danish authorities would be established in order to solve the matter of jurisdiction.

SK observed that in practice problems arise from the fact that some States initiate prosecution following an EAW from an issuing State. Those States would then refuse to surrender the person concerned (in particular own nationals) on the basis that they "already" have initiated proceedings against him/her.

f) How do your judicial authorities resolve cases in which surrender of a person on the basis of a European arrest warrant is refused on the grounds that the person whom the European arrest warrant concerns is being prosecuted in the executing State for the same facts for which the European arrest warrant was issued by your competent judicial authority? Is there any obligation or recommendation for the competent judicial authority to contact the judicial authority that refused to surrender the person on the basis of the European arrest warrant and resolve the conflict of jurisdiction with it? Have such cases yet been resolved in practice?

Various Member States indicated that in such cases the proceedings are stayed until the results of the proceedings in the executing Member State are known, or that the proceedings in the issuing State are (automatically) transferred to the executing Member State.

Basically all Member States stated that there exists no obligation or recommendation for their issuing judicial authorities to contact executing judicial authorities with a view to resolving a conflict of jurisdiction, although in practice such contacts may take place, even as a standard procedure.

Generally speaking, Member States indicated having little or no experience of such cases.

2/ With reference to the experience of your judicial authorities, do you think an increase in cases of the kind referred to above can be expected?

Some Member States indicated that they expect (and sometimes have already experienced) an increase¹ in the number of ‘conflict of jurisdiction’ cases: BG, CZ, DE², EL, ES, FR³, HU⁴, LV, AT⁵, PL, PT, SI, FI and UK.

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- ¹ Reasons named for such expected increase include greater awareness of the legal instruments, greater use made of the right to freedom of movement, more organised international crime.
- ² "It should however be altogether possible, on the basis of good cooperation among the EU Member States, to resolve any problems which occur with positive conflicts of jurisdiction. Cases of positive conflicts of jurisdiction which cannot be resolved should, moreover, become fewer as Member States' confidence in the judicial systems of other Member States increases. The existing mechanisms to avoid double prosecution or punishment are as a rule sufficiently effective, so that there is not expected to be any increase in conflicts of jurisdiction that cannot be resolved."
- ³ "Given the increasing movement of persons in Europe, it seems likely that the number of cases involving such situations will rise in the future. This observation has in fact led France, in negotiating the draft Council Decision increasing the powers of Eurojust, to seek resources to enable its role in facilitating the amicable settlement of conflicts of jurisdiction to be enhanced."
- ⁴ Chief Prosecution Office, Metropolitan Court.
- ⁵ "...in our view the problem of conflicts of jurisdictions has to be seen together with the “ne-bis-in-idem”-principle. (...) However, the quickest jurisdiction needs not to be the best placed one. (...) So, finding a common approach on how to find the best placed jurisdiction in a more structured - but still consensual - way would be a good method to decrease ne-bis-in-idem situations. (...) Furthermore, the approach pursued should also take into account the new Eurojust-decision."

Some other Member States indicated that they do not expect such an increase: BE, DK, HU ¹, LT, NL and SK.

Two Member States stated not having (sufficient) information to answer this question: MT and SE.

3/ Do you think that there could be cases in practice where the authorities of two or more States can conduct criminal proceedings concerning the same facts, without being mutually informed about the situation?

Most Member States indicated that such a situation is possible: BE ², BG, CZ, DE ³, EL ⁴, ES, FR ⁵, HU ⁶, LV, AT ⁷, PL ⁸, PT, SI, FI, SE and UK ⁹.

Some Member States indicated that such a situation will not occur (or is very unlikely to occur): DK, LT, NL and SK.

MT did not have (sufficient) information to provide an answer this question.

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- ¹ Police.
- ² "In the absence of an automatic and obligatory system of exchange of information, this could arise in several cases."
- ³ But rarely.
- ⁴ "A common tool/instrument for exchange of information between MS would be highly recommended."
- ⁵ But "it seems implausible that the same person would be sentenced twice for the same facts".
- ⁶ Although the offender will normally inform the relevant authorities.
- ⁷ In theory possible, but not very realistic.
- ⁸ "However, it seems that such cases should be rather promptly identified thanks to the parties concerned (prosecuted person, advocate etc)."
- ⁹ "It is possible that on occasion two or more Member States will be investigating matters concerning the same facts, particularly at the initial stages of the investigation, without being mutually informed about the situation. However, for reasons already noted, i.e. coming to light via international police channels and/or via ongoing requests between the countries involved for Mutual Legal Assistance, or information of Eurojust, it is very unlikely that two or more Member States would proceed to trial on the same facts without the other Member State(s) being aware."