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NOTE

From: Presidency
To: Delegations

Subject: Mutual legal assistance between the EU Member States and Ukraine

1. At the JAIEX Working Party on 4 April 2016, delegations expressed interest in reviewing and coordinating best practices on a technical level with regard to mutual legal assistance (“MLA”) between EU Member States and Ukraine which, in criminal matters, is based primarily on the 1959 Council of Europe Convention and thematic UN Conventions and, in civil matters, primarily on the relevant Hague Conventions.
2. In order to gather more updated information, NL PRES prepared a questionnaire (DS 1210/16) regarding the mutual legal assistance cooperation with the illegally annexed territories in Ukraine, both with regard to civil and criminal matters. Contributions were received from 18 Member States (doc. 10182/1/16 REV 1).
3. From the responses to the questionnaire the following conclusions may be drawn:
 - a) a majority of Member States has little or very limited experience with MLA with respect to the illegally annexed territories of the Crimean Peninsula and the City of Sevastopol, and

- b) some of the Member States wish to create a common EU standard as regards their cooperation with the illegally annexed territories of Ukraine.
4. During the last JAIEX meeting, delegations confirmed their interest to continue this discussion, including the possibility of a common approach that would improve technical cooperation with the Ukrainian authorities.
5. It was also recommended to consult other working parties: JUSTCIV General questions (regarding MLA in civil matters), COPEN (regarding the MLA in criminal matters) and COEST (regarding political dimension). The Presidency considers it would be more appropriate to hold parallel consultations at high level and/or horizontal groups, e.g. therefore instead of COPEN Presidency has decided to consult CATS.
6. Although the main aim of this paper is a technical one, the definition of the problem itself contains a political dimension, including both political and technical consequences in the relationship with Russia. The illegal annexation of these Ukrainian territories in 2014 provoked a large response by the international community, including the EU, Council of Europe, NATO and UN (except the Security Council). The political situation remains unchanged and the illegally annexed territories remain under the effective control of the Russian Federation.
7. In October 2015, in reaction to the occupation of above mentioned territories by the Russian Federation, Ukraine issued declarations with regard to the application of all Conventions, Protocols and Agreements of Council of Europe as well as the Conventions of the Hague Conference on private International Law where Ukraine is a Contracting Party. In these Declarations, it is stated that Ukraine is not able to exercise effective control over occupied territories of the Autonomous Republic of Crimea and the city of Sevastopol and some other districts and, as a consequence, the application and implementation by Ukraine of the obligations under these Conventions, Protocols and Agreements is limited and cannot be guaranteed. Ukraine also declared that "Documents or request made or issued by the occupying authorities of the Russian Federation (...) are null and void and have no legal effect regardless of whether they are presented directly or indirectly through the authorities of the Russian Federation." With regard to the illegally annexed territories, Ukraine asked to communicate through the Ukrainian central authorities in Kyiv.

8. The fact that MS do not recognize the annexation of the Ukrainian territories by the Russian Federation offers several possible scenarios in regard to those territories when applying for MLA:
- a) continuation of communication with the Ukrainian authorities only. The practical consequence is that Ukrainian authorities will be not able to carry out the MLA if the relevant person or evidence is located in the territory not under their effective control and in absence of cooperation with Russia, we risk to create a "territory of impunity".
 - b) communication with the Ukrainian authorities by asking them to have the MS request executed by the Russian authorities. In that situation, MS would be asking Ukraine to apply the doctrine of effective control of the illegally annexed territories instead of the MS. This solution would be very uncommon and would not only presuppose an agreement by Ukraine to commit to this, but also the willingness of Russia to accept such requests.
 - c) communication directly with the Russian Federation, on a case by case basis, when it comes to extremely serious criminal offenses or crucial social and family interests (e.g. applying the doctrine of effective control in some conditional way). This approach would prevent the creation of a territory of impunity and at the same time, it would seem as an effective pragmatic solution preserving the possibility to seek judicial cooperation in relation to those territories. However, this might be contrary to the above 2015 Declarations of Ukraine and must therefore be carried out in close dialogue with the Ukrainian authorities.
 - d) setting up of a mediator for mutual legal assistance/judicial cooperation at EU level (e.g. from EEAS or from Eurojust) to communicate with the Russian authorities. This solution might be sensitive to Ukraine. Involvement of Eurojust would be limited to criminal matters only.

9. Evaluating the consequences of any common approach must take into consideration not only the situation when EU MS sends a request to Russia directly or via Ukraine, but also the mirror situation when a MS could be a recipient of such a request from the Russian Federation in regard of those illegally annexed territories.
10. In respect to the judicial cooperation in criminal matters, a different approach might be favoured as regards extraditions than as regards other aspects of judicial cooperation.

Questions

In view of the above-mentioned situation, Member States are invited to express their views on the following questions:

1. Do you support the idea of formulating a common EU policy/common EU approach concerning the applications for MLA in regard to Ukraine with respect to the illegally annexed territories of the Crimean Peninsula and the City of Sevastopol?
2. If yes, should it be a in a non-binding (guidelines) or a binding form ? Which of the above-mentioned approaches (point 8) would you prefer as the basis for the common EU policy in this area ?
3. If the application of the doctrine of effective control of the illegally annexed territories is acceptable for you, under which conditions and in which cases should it be applied by MS?
4. If your answer to question 3 is negative, would you prefer to monitor the situation periodically and to continue the exchange of best practices at the EU level in this regard?