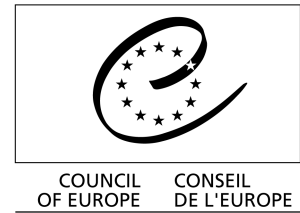


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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**COMMITTEE OF EXPERTS**  
**ON THE OPERATION OF EUROPEAN CONVENTIONS**  
**ON CO-OPERATION IN CRIMINAL MATTERS**  
**PC-OC**

**Draft Questionnaire on jurisdiction and transfer of proceedings**

**Prepared by the Secretariat  
in co-operation with  
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## Introduction

The first objective of this questionnaire is to gather information about the application (or the lack of it) of the Council of Europe's existing instruments on the 'transfer of proceedings'. The second is to obtain the member states' points of view regarding the need for the development of a new instrument in this field or for initiatives to improve the effectiveness of the current instruments.

For the first objective detailed statistics are not necessary. It is more important to indicate legal or policy-related reasons for the ways in which the instruments are (not) used. To this end, some indication of the number of outgoing and incoming requests for the transfer of proceedings, the laying of information and / or the application of the 'aut dedere, aut judicare'-principle over the past few years should be sufficient to give a clear view of the practical application of the instruments.

The term 'transfer of proceedings' covers roughly three variants. The questionnaire reflects this division.

The first is the 'real' transfer of proceedings as regulated by the 1972 European Convention *on the Transfer of Proceedings in Criminal Matters* (CETS No. 073). A 'proper' transfer of proceedings is in essence a transfer of jurisdiction. Upon agreement to transfer a case, the requesting party will lose its original forum to prosecute the matter, while the requested party will acquire procedural jurisdiction over a case that was 'built' abroad. A transfer of proceedings may require a treaty basis.

The 1972 Convention has not been very successful in terms of ratification. Out of 47 member states, 25 have ratified the instrument. 10 other member states have signed it. The reasons for not ratifying the instrument that existed in the '70s are perhaps no longer relevant in 2011. Other member states however may (still) have very fundamental reasons for not signing or ratifying this particular instrument. In part the questionnaire aims to assess the fundamental reasons against accession to this particular instrument or even against the very concept of the 'transfer of proceedings'.

On the other side of the spectrum, Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters provides for the mere possibility to *lay information* to another state. The laying of information does in no way create obligations. There is no transfer of jurisdiction and thus a maximum level of appreciation lies on the requested state's side. In fact, the laying of information does not usually require a treaty basis. The flexibility of this type of co-operation is also its inherent weakness. Anything that cannot be prosecuted can be deferred to the state that seems to be competent on the basis of the nationality of the perpetrator, the victim or the (partial) location of the offence for instance. On the receiving end, such transmissions can easily be dismissed.

The laying of information is probably widely used. At the same time one could question whether the high volume of requests matches the expected results. Maybe only a fraction of the requests under Article 21 actually lead to the prosecution of the offence. It is important to obtain information on the follow-up to such requests.

A third, intermediate, situation concerns, the 'aut dedere, aut judicare' principle for cases of the refusal of the extradition of nationals. This principle is laid down in Article 6§2 of the 1957 Convention on Extradition. The 'transfer' of the proceedings is a possible consequence of the refusal of an extradition because of the nationality of the person sought. The principle implies an obligation to assess the legal possibilities to prosecute.

Some member states do extradite their nationals, even unconditionally, which means that the 'aut dedere, aut judicare' principle is never applied or is applied only in cases of refusal of extradition

on (certain) other grounds. One of the questions related to this type of 'transfer of proceedings' is about the possibility of widening the scope of the principle. Other grounds of refusal could be envisaged which would 'trigger' the application of the principle.

The answers to the questionnaire should not be limited to legal reasons (limited extraterritorial jurisdiction, double criminality and double lapse of time, evidence requirements, etc.) for not applying either one of the three types of 'transfer', but should also cover practical issues such as budget constraints, translation issues, the incompleteness of transferred case files or domestic policy regulations, for instance with respect to 'de minimis cases' or prosecutorial priority.

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**A Proper transfer of proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)**

1. If your State is not Party to the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, what are the reasons for the non-ratification? Is the effect of the Convention on jurisdiction considered a problem?
2. Is your State able to transfer proceedings (and accept such transfers) without a treaty basis, i.e. on the basis of domestic legislation and / or on the basis of reciprocity?
3. If your State is Party to the European Convention on the Transfer of Proceedings in Criminal Matters:
  - a. What legal and / or practical obstacles have you faced in the implementation of the Convention?
  - b. How frequently do you apply the Convention as the requesting State and as the requested State?
  - c. Can you provide an indication of the 'success-rate'?
  - d. What are the types of cases most often dealt with (e.g. in terms of type of offence and / or minimum and maximum sentence)?
  - e. Do you see any scope for the improvement of the provisions of the Convention or its practical implementation?

**B. Laying of information under Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)**

4. Concerning the use of Article 21 of the European Convention on Mutual Assistance in Criminal Matters of 1959 on *laying of information*:
  - a. Do you face any legal or practical obstacles in acting on information laid by another Party with a view to proceedings in the courts of your country? Please provide details.
  - b. How frequently is the possibility to transmit information to another State Party used by your authorities?
  - c. What is your evaluation of the percentage of cases where this information leads to concrete action by/in the requested Party, based on the obligation of the requested Party to give notification of any such action (Article 21, paragraph 2)?

**C. Transfer of proceedings as an alternative to extradition: the application of the ‘aut dedere, aut judicare’ principle under Article 6§2 of the European Convention on Extradition (ETS No. 24)**

5. Concerning the obligation to extradite or prosecute as contained in Article 6§2 of the European Convention on Extradition of 1957 (ETS No. 24) – the *aut dedere aut judicare* principle:
  - a. How is this principle implemented in your internal legislation?
  - b. What are the main obstacles to the application of this principle and do you feel a need to address such obstacles through binding or non-binding standards?
  - c. Do you apply the *aut dedere aut judicare* principle exclusively within the limits of Article 6§2 of the Extradition Convention, i.e. insofar as the extradition was refused *solely for reason of nationality* or do you widen its application to other grounds for refusal of extradition? Do you have knowledge of diverging applications by other (requested) Parties?
  - d. Please provide information on how often this principle is applied in practice in cases where your state does not grant extradition, or where your extradition request is refused by the requested state.
  - e. Does your country contemplate any change in its domestic legislation concerning the scope of application of the *aut dedere, aut judicare* principle? If so, in which direction and to what extent?
6. Do you think that there is any need for action at Council of Europe level to tackle positive or negative conflicts of jurisdiction in addition to the existing standards or for recommendations/guidelines to be drafted to improve their implementation?

Please specify for 'proper' transfer of proceedings (Transfer of Proceedings Convention), laying of information (Article 21, MLA-Convention) and *aut dedere aut judicare* (Article 6§2, Extradition Convention).