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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

Discussion paper
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DUAL CRIMINALITY *IN ABSTRACTO* OR *IN CONCRETO*?

Professor Lagodny (see PC-OC/WP (2004) 2 and PC-TJ (2005) 06) has examined the question from the side of lapse of time in particular. I will now put the question from a different perspective. Let me go step by step.

First step: It might well happen that in order to prosecute certain offences a private complaint is necessary; that would be the case under Italian law, for instance, in minor cases of fraud or personal injury (which would be however extraditable offences). The mere fact that according to the law of the requesting State such a pre-requisite is not required would not prevent Italian authorities to grant extradition. Such a pre-requisite is something that is outside the crime itself. I think that conclusion might be considered as widely accepted. That means that the offence is to be punishable *in abstracto* in order to be an extraditable offence and to comply with the principle of dual criminality.

Further steps:

a. the behaviour does not only have to fit the definitions of the requirements of a certain crime but has also to fit other requirements: for example absence of justification (e.g. self defence) or other excuses (e.g. insanity). This is punishability *in concreto*; that should not be relevant as to extradition and double criminality in judicial co-operation (see Lagodny in PC-TJ cited above). It is to the competent authority of the requesting State to assess facts, presence of excuses, criminal liability.

b. according to Italian law an individual cannot be considered criminally liable of a theft where the theft was committed against parents for instance. If such an excuse is not provided for by the law of the requesting State, the question is whether the person sought might be surrendered under the extradition system. Any idea?

c. sometimes the criminal law provides for thresholds. I had a case (it was under the EAW, but the question still arises under the extradition system) of an EAW that had been issued in relation to a fiscal offence. Although the definition of that particular tax was different it was evident that the different definition was not relevant. But –this is the point- according to Italian law for that particular offence a threshold of 77.000,00 (seventy seven thousand) is required in order to have a criminal offence; otherwise it is an administrative offence (no criminal; not even ordnungwidrikeiten). The request was from Romania; I don't know whether that threshold would be considered extremely high in Romania. Now, according to Italian criminalists and academicians in penal law such a threshold is to be considered as a constitutive part of the crime: i.e. no crime if the limit is not reached. I was for the Prosecutor general before the Court of cassation and I succeeded in having the sentence refusing the surrender being declared void and sent back to the court of appeal for a new decision. My reasoning was that we should look at dual criminality *in abstracto* and I explained that one thing is to examine the matter from the point of view of domestic legislation one other thing is looking at the matter from the point of view of international co-operation. Although the example was not fully appropriate (because driving while being drunk is not probably an extraditable offence under the 1957 convention or might not give rise to a surrender under the EAW), I impressed the court saying that was quite unreasonable that driving while being drunk could be an extraditable offence depending on whether national legislations provide for different thresholds (e.g.: no threshold in Germany, not more that 0,8 of alcohol in the alcohol test in Italy and not more than –say- 0.3 in Spain). Would that be reasonable in international co-operation? Shouldn't we look at things in a dynamic way? Shouldn't be clear that one thing is looking at criminal liability from the side of domestic legislation in view of accomplishing the ends of domestic justice and one other thing is examining the matter under the angle of international judicial co-operation? Any idea on that?

Could all that be considered as food for thoughts?

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