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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 25 January 2012 PC-OC (2012) 02

[PC-OC/Documents 2012/ PC-OC(2012) 02]

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

Note on dual criminality, in concreto or in abstracto

Secretariat memorandum prepared by
the Directorate General of Human Rights and Rule of Law
DG I

During its 61st meeting, held on 22 to 24 November 2011, the PC-OC discussed the issue of dual criminality "in concreto or in abstracto" on the basis of a reflexion paper (Doc PC-OC (2011)19) submitted by Mr Eugenio Selvaggi (Italy).

The issue was discussed in the context of the European Convention on Extradition which reads in its Article 2, paragraph 1:

« Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty…. »

Some Parties, such as Germany and the Russian Federation, indicated that the wording of the principle of double criminality leads them to adopt an interpretation "*in concreto*". Double criminality "*in concreto*" means that the concrete behaviour underlying the request fulfils all requirements of punishability under the law of the requested state. The alleged behaviour should not only fulfil the definition of a crime but there should also be no justification (self-defence), excuse (insanity) or other reasons excluding punishability.

Other Parties, such as Belgium, Denmark, Italy and Sweden indicated that they apply an interpretation "*in abstracto*". Double criminality "*in abstracto*" means that consideration of the behaviour in question limits itself to the question of whether such behaviour is punishable, regardless of its legal qualification (nomen juris) or the existence of possible reasons excluding punishability.

For example, tax fraud or drink driving are prohibited in all Parties but different jurisdictions may introduce different legal thresholds (in relation to the amount of money at stake or alcohol taken) that such acts should reach to qualify as criminal offences. When applying an "*in abstracto*" interpretation, the threshold is not a constituent element of the crime: "tax fraud is tax fraud and drink driving is drink driving".

Parties in favour of the "*in abstracto*" interpretation justify their position by a teleological approach to the double criminality principle. It was argued that a request for extradition is not a request for transfer of jurisdiction, nor a request for a trial but a request to assist the appropriate jurisdiction (that of the requesting state) in rendering its justice. An in abstracto interpretation would therefore be the most effective way of serving this aim

The PC-OC agreed that the double criminality principle should apply at the moment when the decision to extradite is taken. Other moments, including when the alleged offence took place or when the request for extradition was introduced, are therefore not considered as relevant.

The delegate of the Russian Federation indicated that the interpretation of the double criminality principle was a question of utmost importance and that a position paper will be produced in consultation with the Constitutional Court. Input by other countries would also be highly valued.

Previous discussions concerning the double criminality principle

1. The PC-OC discussed the double criminality principle from a general perspective during their 49th meeting in 2004 on the basis of an opinion prepared by Professor Dr Otto Lagodny , University of Salzburg (Doc PC-OC/WP (2004)2). Reference may further be made to Prof Lagodny's report on "possible ways to reduce the Double Criminality Requirement: From double criminality to double prohibition" (PC-TJ(2005)06) prepared for the Committee of Experts on Transnational Criminal Justice (PC-TJ)

The report of the 49th meeting (Doc PC-OC (2004)20) reflects the discussion as follows:

*"The Committee also held a discussion on the topic of "**double criminality**" on the basis of the document prepared by Prof. Lagodny. It referred notably to the European Arrest Warrant, which does not require the need for double criminality for a series of crimes, among the E-U member States.*
As to non-EU member States, differences should be made between requests for extradition and requests for other forms of mutual assistance. Double criminality is in practice less and less considered as a condition to grant requests for mutual assistance. In the case of extradition, most participants are of the opinion that the condition of double criminality is a principle that can be discussed but cannot be removed in the immediate future."

2. The issue of double criminality had also been discussed by the PC-OC in 2000, during their 40th meeting in the context of the Convention on the transfer of sentenced persons
The discussion in this context is reflected in the following abstract of the meeting report (Document PC-OC (2000)13).:

« *Transfer of sentenced persons / Dual criminality / Article 3*

95. ***Article 3 – Conditions for transfer***

1 ***A sentenced person may be transferred under this Convention only on the following conditions:***

[……]

e ***if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and***

[……..]

96. A question was raised (by the expert from Norway - cf. docs PC-OC (2000) 7), as follows. In one case, a Norwegian citizen applied to be transferred to Norway to serve a sentence imposed on him in another Party. He claimed that he had been provoked by the police into performing the illegal act for which he was sentenced. Such provocative methods by the police are accepted and legal in the sentencing Party; however, they may not substantiate a conviction in Norway. Thus, the Director of Public Prosecution concluded that, had the act been committed in Norway, no punishment could have been imposed. The Norwegian authorities thus rejected the application for transfer. On appeal, according to the Norwegian Public Administration Act, it was found that the conditions in Article 3(1)(e) had been met and, therefore, transfer was finally granted.

97. In reaching conclusions in the appeal, emphasis was put on the aims of the Convention, as stated in the Preamble and in Article 2, as well as the opinion of Mr. Michal Plachta stated in the book «Transfer of Prisoners under International Instruments and Domestic Legislation» (1993) page 315.

98. Once transferred, the person now claims that he is illegally detained in Norway because the act for which the sentence was imposed, does not constitute a criminal offence in Norway.

99. The Ministry of Justice asked for the Committee's opinion on the following questions:

i. Should the expression «the law» be interpreted only as the written law, i.e. the Penal Code, or can it also include the interpretation of «the law» as in «the whole body of such customs or practices», i.e. also case law etc.?

ii. Is the expression «double criminality» to be interpreted as double criminality in concreto or double criminality in abstracto? There seems to be a difference in opinion between the «Explanatory Report» and Mr. Plachta as the latter finds it sufficient with double criminality in abstracto while the report indicates the opposite.

100. The Committee thought that the word "law" in Article 3 of the Convention should be interpreted to include all sources of law (statute, common law, customary law, ...), in the meaning usually given to the word that figures in the French version of the Convention, namely the word "droit" (as opposed to "loi").

101. Many experts talked in favour of dual criminality being assessed in concreto, as is proposed in the explanatory report. In abbreviated terms, dual criminality means (a) looking at the "law" of both countries, as it applies, or as it would apply, to the concrete circumstances of the case, and (b) assessing whether there is sufficient overlap in view of the effect sought.

102. Recalling the provisions of the Convention that require that the person's consent must be informed, many said that such a consent carried with it the acceptance of the effects of transfer in the administering Party. In other words, the possibility should not be considered of giving transferred persons the right to challenge the effects of transfer in the administering State.

103. Moreover, it would be circumventing the provisions of Article 13 to give transferred persons the right to apply to the administering State for a direct or indirect review of the judgment

104. It was also said that the legitimate interest of the sentencing State in that the sentence be fully served cannot be frustrated by allowing for the sentence to be challenged in the administering State.

105. It can always happen that it is not before the actual transfer of the person that it becomes apparent or that it is found that the dual criminality requirement was no met. In such circumstances, the remedy could not be to free the person, but rather to annul the transfer and return the person. »

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