

Strasbourg, 4/10/2006

PC-OC Mod (2006) 03

COMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS

COMITE D'EXPERTS
SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPEENNES
SUR LA COOPERATION DANS LE DOMAINE PENAL
(PC-OC)

1st meeting of the restricted Group of experts on international co-operation
1^{ère} réunion du Groupe limité d'experts sur la coopération internationale
(PC-OC Mod)

Strasbourg, 21-22/09/2006

Draft meeting report

1. Opening of the meeting

The Chair of the Committee, Mr. Eugenio Selvaggi, opened the meeting. Having reminded the members of the group on the background of this exercise, he emphasised the need for concrete results to be presented to the plenary in October 2006.

2. Adoption of the agenda

The draft agenda was adopted.

3. Discussion on possible steps and initiatives to improve the efficiency of international co-operation in criminal matters

The Group discussed the various practical measures and normative initiatives which would contribute to improve the efficiency of international co-operation. The result of the discussions appears in Appendix I to this report.

4. Follow up and working methods

This meeting report will be forwarded to the members of the Group first, for eventual comments, and then to the members of the PC-OC. The next meeting of the Group will further deal with the remaining matters listed on the document presented by the Secretariat. The results of the first two meetings of the Group will be presented to the plenary at its 52th meeting (18-20 October).

5. Other

The Conference on "improving European co-operation in criminal matters", to be held in Moscow on 9-10 November 2006, was introduced. The participation of several full Ministers from Member States are announced. The Group felt important that the PC-OC be informed of the results of the conference.

* * *

Appendix I:

**Measures to improve the efficiency of International co-operation in criminal matters
Outcome of the first meeting**

The first meeting focused on practical measures and on extradition mechanisms.

I. PRACTICAL MEASURES

1) Compendium of texts, explanatory notes

Two publications are expected to be ready by end October 2006 and presented at the Moscow Conference on “Improving European co-operation in criminal matters (9-10 November 2006):

- a) the publication of the CoE texts on co-operation against crime, which collects the CoE criminal conventions and protocols, presented by subject matter: extradition, mutual assistance, terrorism, economic crimes, etc. (in French, English and possibly in Russian language);
- b) the publication of the “explanatory notes and relevant CoE documents on extradition”, presenting, for each article of the convention on extradition and its protocols, the text of the convention, the extract from the explanatory report as well as the “comments” which are taken from relevant CoE recommendations and from meeting reports of the PC-OC, when dealing with the application of the article at stake. A research on the standards applicable to persons in transnational criminal proceedings (presenting the main findings from the ECtHR) is added, as well as the texts of the CoE Resolutions and Recommendations.

The preparation of additional publications is foreseen, such as explanatory notes on mutual assistance in criminal matters and explanatory notes on the transfer of sentenced persons. Their realisation will however depend on additional resources to the Secretariat.

The publications will most probably be sold to the public. At a later stage, an electronic version, with all relevant hyperlinks, will be put on the web and will be accessible to the public. The Secretariat will enquire on the possibilities to:

- have the publication available through CD-Roms and
- download the publication from the web site (freely or with charge).

The Secretariat would ensure a regular update of the publication (updates would be highlighted). Updated editions of the books might be envisaged, where necessary/opportune.

2) Web site, data base

- a) The web site of the Committee provides with useful guidance to the Committee members by showing all documents relevant for the Committee’s work as well as for practitioners in judicial co-operation.

The broader transnational criminal justice web site (www.coe.int/tcj) provides with the most relevant instruments of international co-operation (CoE Conventions, Recommendations) and tools for their implementation elaborated in the framework of the PC-OC.

The Web site could also present in the future the newest developments in the field of international co-operation, be it related to the Conventions (new accession, new reservation,...) or – upon information received by the Secretariat – to their application by States (novelties in other fora, important judicial decisions, etc). The same

information could be forwarded by mailing lists to the members of the PC-OC and/or the points of contacts (see below), who, in turn, would be responsible for disseminating the information to national interested persons or institutions.

Additional links should also be offered on the web on:

- the most relevant international/regional instruments
- existing databases (EJN, Interpol, PACO Manual, CoE treaty web site).

- b) The PC-OC report to the CDPC, following the New Start, report suggested the setting up of a database presenting all international legal instruments (universal, regional and bilateral), relevant national law and practice as well as caselaw. The setting up of such a database would require additional resources: sophisticated (and expensive) software and staff. These additional resources are not available at present.

Instead, there might be a possibility for the CoE to develop a simpler data base, focusing on national information deemed essential as far as efficient co-operation is concerned.

It could contain, for each country, the following elements:

- the competent authority / to whom a request should be sent to
- languages requirements
- time limits
- documentation
- statutes of limitation for special offences
- double criminality
- extradition of nationals
- means of communication
- other/particularly relevant information

Mutatis mutandis, this scheme would apply, for the three main Conventions: extradition, mutual assistance and transfer of sentenced persons. For the latter specific questions could deal with matters such as : conditional release, transfer of “residents”, transfer of mentally disordered persons, continued enforcement or transformation of the sentence;...

The elements should be available in English. They should be given to the Secretariat by the national expert member of the PC-OC. The Secretariat will regularly consult each representative to ensure the accuracy of the data.

It has been agreed that the Chair would elaborate introductory and practical information on the basics of international co-operation, which could introduce the database.

3) Networking

The PC-OC already fulfils an essential role in promoting networking among national authorities in charge of judicial co-operation. In addition, regional and multilateral activities conducted under the CoE programmes of assistance further promote networking among practitioners and judicial actors.

It is felt that the existing “list of national officials in charge of international co-operation” (PC-OC Inf 6) constitutes an excellent basis for the development of a network. That list could however be simplified: the number of persons presented by each member States as contact persons should be reduced to a maximum of 2 to 3 per State, with their complete contact details, including e-mails (and, where available the contacts to be reached beyond the working

hours). The persons to be presented should have the necessary competence and be available and committed to efficiently deal with requests put to him/her.

To the extent possible, it would be desirable that members of the PC-OC are also acting as points of contacts.

Such a list would be available among all persons present on the list and to the PC-OC members. The possibility to have it available to the judicial authorities and to the law enforcement agencies dealing with judicial co-operation could be envisaged. A question remains whether it would be useful or opportune to have it available to the public at large.

Once the list is completed, the members should be encouraged to act in a responsible manner, both:

- in replying to requests related to co-operation and
- in diffusing the relevant information both towards the other members of the network and to their national competent authorities.

The Chair could prepare a contribution, by the next meeting, in co-operation with Joana Gomes Ferreira, on the expected role of the contact persons in such a network.

An inaugural meeting of these contact persons could be envisaged in connection with a forthcoming PC-OC meeting. This would not create an extraordinary additional burden for the budget (the PC-OC members would have 1 extra day per diem and the other national delegates would pay for themselves). Such a meeting could help in

- adopting best practices on the way to concretely and efficiently dealing with co-operation requests as well as
- developing personal contacts and hence increase trust and confidence among members of such a network, which is considered as being crucial in order to make judicial co-operation more effective.

4) Office of specialists

The tasks devoted to an office of specialists are to some extent covered by the Secretary of the Committee who answers, as far as possible, to specific questions brought to him.

The Secretariat receives an average of approx. 10 requests per year. Most of them come from individuals and relate to requests for transfers. The Secretariat succeeds to handle them within relatively short periods of time.

The functions of an Office of specialist could certainly be enlarged with a view to play a more proactive role and, by doing so, contributing to the efforts to build an efficient and reliable network and to make CoE instruments more visible (see also the reference to a “newsletter”, below, under 5.). Such endeavour could however be envisaged only with a reinforcement of the Secretariat, for instance through the secondment of a competent lawyer to the Council of Europe Secretariat.

5) Other

The Group agreed that better and more extensive diffusion of information pertaining to judicial co-operation is needed. Practitioners / PC-OC members will be encouraged to communicate news to the Secretariat which could disseminate them through the web site and by e-mail, for instance in the form of a **newsletter**.

A sample of such newsletter could be prepared by the Secretariat, upon contributions by the Chair and other Group members. It will be presented at the forthcoming plenary meeting.

II. NORMATIVE TEXTS

1) Extradition

1. Simplified extradition:

The extradition could be simplified and the time limits could be considerably shortened in cases where the requested person consents to his/her surrender to the requesting State. Elements from the EU Convention on simplified extradition procedure (1995)¹ could be examined.

As it seems, several member States already have the legal basis or even apply simplified extradition. Practice shows the many advantages of such a procedure, which *i.a.* considerably reduces the duration of detention in the requested State.

The following elements could be considered being inserted in CoE mechanisms on extradition:

- a) the reduction of the documents requested by Art 12 ECE (the request and supporting documents);
- b) the consent of the person and of the requested State;
- c) the notification of the decision;
- d) the time limits for the decision and for the surrender.

The question of the renunciation of the speciality rule and of its consequences deserves further consideration. The speciality rule is indeed perceived in two ways:

- on the one hand, it relates to the rights of individuals not to be prosecuted in the requesting State for other crimes than the ones for which he/she has been extradited.
- on the other hand, it is linked to the exercise of States sovereignty and to grounds for refusing an extradition.

Any renouncement to the speciality rule by an individual should therefore be protected by some guarantees (access to lawyer, interpreter...). For some States, it is difficult to envisage to easily renounce to the speciality rule.

It was agreed that B. Bohacik and E. Jenni would prepare, in consultation with the Chair, some structured elements for the forthcoming discussion (16-17 October).

It will also be requested to all PC-OC members to prepare, for the forthcoming meeting their national legislation and practice regarding the simplified extradition.

As a conclusion, the members of the Group considered that it is important to find a solution which is acceptable by all but which should in no way hinder the existing practice on simplified extradition.

2. Grounds for refusal:

The grounds for refusals could be reduced; they could aim primarily at ensuring the respect of the person's fundamental rights and of the non discrimination principle (see below under 3.). Developments in the EU could be considered in this regard, in particular in the EU Convention on extradition (1996)² and in the EU European Arrest Warrant (2002)³.

¹ Available through the EU web site ([click here](#))

² Available through the EU web site ([click here](#))

³ Available through the EU web site ([click here](#))

a. Political offence:

However rarely invoked in practice, this ground of refusal is potentially an obstacle to effective co-operation. It should therefore as far as possible be limited.

Consideration can be made to the work underway by Interpol. In order to limit the application of such clause, a series of offences have been identified, for which the political offence should not be invoked by States as a ground for refusal.

Could a general clause on non discrimination have the same effect (see Art 12. of the EAW preamble⁴ and Art 21 of the CoE convention on prevention of terrorism)?

Consideration could also been given to Mr Zimin's proposal⁵ that offences provided for in criminal conventions ratified by both parties could not be invoked as political offences (see Art 20 CoE convention on prevention of terrorism). The political offence clause should also be excluded for offences provided for in international humanitarian law (war, genocide, crimes against humanity).

b. Military offence (Art 4 ECE):

Is the provision on exclusion of such offence from the extradition mechanisms necessary? It is not mentioned in the CoE modern instruments nor in the EU Convention (1996) or in the EAW.

This provision does however not seem to create difficulties in practice. In addition, in the context of Interpol, States are not supposed to circulate persons for military offences.

Discussion on a possible removal of this ground of refusal should therefore be envisaged only if a complete re-drafting of the Convention is decided.

c. Fiscal offence:

Should Art 2 of the 2nd additional protocol to the ECE be kept as it is or should it evolve towards the optional ground for refusal, as set forth in the EAW (Art 4.1⁶)?

As it is the case for the military offences, some members of the Group considered that this issue should possibly be discussed only if a complete re-drafting of the Convention is decided.

3. Lapse of time (Art. 10 ECE)

In the current mechanism, the lapse of time has to be considered both in the requesting and in the requested States and increases therefore the risk of obstacle to extradition.

⁴ Art 12 of the Preamble on the EAW: "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."

⁵ See in [PC-OC \(2005\)22](#).

⁶ Art 4.1, EAW: "The executing judicial authority may refuse to execute the European arrest warrant: 1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State;"

It is suggested that, as provided for in the Schengen agreement (Art. 62⁷), lapse of time is considered only according to the law of the requesting State.

The Group invites the PC-OC to consider this proposal, keeping in mind the links with the double criminality issue (if lapse of time is effective in the requested State, is the offence still covered by the double criminality requirement – as defined by national law or judicial decisions?).

4. Reservations

Reservations should be limited to specific provisions.

Existing reservations could be reviewed and updated or withdrawn.

As to future reservations, a limited duration of validity could be envisaged (3, 5 or 10 years – See Art. 7, EU Convention and Art 20.5 of the Convention on prevention of terrorism). The interest of such a limitation should however be balanced with the interest to have as many States as possible ratifying the instrument and with the necessity of an efficient co-operation.

5. Rule of speciality

The principle could be reaffirmed.

Renunciation to the speciality rule could be envisaged:

- a) in case of simplified extradition, if the person consents (see above 1.)
- b) following the surrender, before the requesting State's judicial authorities.

In the latter situation, the following practical questions need further discussion: should such a consent be transmitted to the requested State? Would the requesting State need the agreement of the requested State before prosecuting the person? Should the safeguards of Art. 13 EAW apply in this case as well (the consent should be expressed “voluntarily and in full awareness of the consequences”, right to legal counsel). Should all documents and evidence be sent to the requesting State? How? Should a model form be used for receiving the consent of the person?

6. Time limits

Specific time limits in case of simplified extradition could be inserted.

As to time limits for the extradition procedure, any time limit has to be compatible with

- a) the imperatives of procedures in the judicial and political phases
- b) the effective exercise of the requested person's rights.

The Group considered that it would not be realistic to insert strict time limits in a binding instrument, as national procedures differ too widely among States.

A non binding instrument could be more appropriate, outlining different possible measures to reduce time limits and avoid long procedures (and long detention before extradition).

The need for expedient procedure applies for extradition for the purpose of extradition as well as for the purpose of executing a sentence, in particular considering the fact that it seems that this period of detention pending extradition is not taken into consideration by all States.

7. Compensation for the extradited or requested person

Three hypotheses have been identified and discussed:

- a) the person is extradited and then acquitted in the requesting State:

⁷ Art 62, Schengen agreement: “As regards interruption of limitation of actions, only the provisions of the requesting Contracting Party shall apply.”

That State could be held responsible and be asked to pay compensation (at least to cover the detention period) and to provide with the possibility for the person to return to the requested State. Some States compensate for detention and pay for the return of the person. Some other do not consider that they liable to compensate in such cases.

Some members observed that the acquittal may be caused by factors not dependent from the requesting State (ex: the requested State did not provide with evidence or the person's lawyer provide with information on a decision related to same facts in a third country - *ne bis in idem*). The question of compensation is to be clarified in such cases.

b) *the person is arrested in the requested State and the requesting State withdraws its request of extradition:*

Compensation could be provided by the requesting State.

A member underlined that this could also apply if the requesting State sends the extradition request too late.

In one State, compensation is paid by the requested State, which took the responsibility to affect the person's rights and freedoms.

The same could apply for instance if an authority from the requesting State does not in fact take the person over, despite a positive decision on extradition.

c) *the person is arrested in the requested State which refuses to extradite the person, following a period of detention:*

If a compensation is to be granted in such a case, it could be provided either by the requesting State, which issued the request and lead to the detention, or by the requested State, who effectively arrested the person.

The Group is submitting this question to the plenary, as it seems that practice, in terms of compensation widely varies among States. An approximation of legislation or practice would be desirable in this matter.

As instructed by the CDPC, the Group also discussed the following item, preparing elements for a longer term decision:

1. Extradition of nationals

Members of the group confirmed that this is a delicate question on which it is difficult to elaborate new solutions. States could however be encouraged not to consider the nationality or residenship of a requested person as a ground for refusal (see Art. 7 of the EU Convention, with the possibility of reservations).

Rather, considering each case on its merits, solutions can be found by using the already existing provisions in the CoE instruments; these are:

- the prosecution of a national by a requested State which refuses to extradite him/her, in application of the principle "*aut dedere aut judicare*", as foreseen in Art 6.2 ECE. Two limits have been identified: (1) a conventional obligation might conflict with the principle, in some States, that the decision to prosecute or not is of discretionary nature and (2) some States do not have extraterritorial jurisdiction to prosecute the facts. In addition, a local prosecution might be hindered by the non-transmission of all necessary documents by the requesting State. A mandatory application of the principle might therefore be difficult to envisage. Due consideration could be given to the wording of recent CoE Conventions (eg: Art 18 of the convention on Prevention of Terrorism⁸).

⁸ Art 18, CoE Convention on the prevention of terrorism: "1 The Party in the territory of which the alleged offender is present shall, when it has jurisdiction in accordance with Article 14, if it does not

- The transmission of the criminal proceedings to the requested State for the purpose of prosecuting its national, in application of the convention on transmission of criminal proceedings (which requires much more ratifications in order to really offer an alternative).

The extradition of a national can also be subject to the condition that the person would return after the judicial decision for the purpose of executing the sentence (the so called "Dutch clause"). This faculty is enshrined in Art 5.3 of the EAW.

The question on the legal basis for the return of the person could then be clarified. Elements from the ongoing discussion within the EU on this matter could be considered. If it is to be applied in application of the European Convention on the transfer of sentenced persons, the conditions set forth in that convention, such as double criminality, apply. The interpretation of this specific requirement (be it *in concreto* or *in abstracto*) is then to be verified. Time limits could be agreed upon, by which the transfer is to be achieved. Instead, if it is considered as a condition for extradition, the applicable conditions for the return are set forth in national legislation.

Such a possibility could be inserted, as an alternative, in a CoE instrument on extradition.

extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that Party. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that Party. 2 Whenever a Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that Party to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this Party and the Party seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1."

APPENDIX II

PC-OC\groupe modern.\Docs 2006\PC-OC Mod(2006)OJ1 bil
<http://www.coe.int/tcj/>

Strasbourg, 11/09/2006

PC-OC Mod (2006) OJ 1

COMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS

COMITE D'EXPERTS
SUR LE FONCTIONNEMENT DES CONVENTIONS EUROPEENNES
SUR LA COOPERATION DANS LE DOMAINE PENAL
(PC-OC)

1st meeting of the restricted Group of experts on international co-operation
1^{ère} réunion du Groupe limité d'experts sur la coopération internationale
(PC-OC Mod)

Strasbourg, 21-22/09/2006 – Room /Salle 17

Draft Agenda
Projet d'ordre du jour

1. Opening of the meeting / *Ouverture de la réunion*
2. Adoption of the agenda / *Adoption de l'ordre du jour*
3. Discussion on possible steps and initiatives to improve the efficiency of international co-operation in criminal matters /
Discussion sur les démarches et initiatives envisageables pour améliorer l'efficacité de la coopération internationale dans le domaine pénal
 - 3.1 Practical measures / *mesures pratiques*
 - Compendium of texts, explanatory notes / *compilations de textes, notes explicatives*
 - Web site, data base / *Site web, base de données*
 - Networking / *Mise en réseau*
 - Office of specialists / *Bureau de spécialistes*
 - *Other ? / Autres ?*
 - 3.2 Normative texts / *textes normatifs*
 - Extradition / *Extradition*
 - Mutual assistance / *Entraide judiciaire*
 - Transfer of sentenced persons / *Transfèrement des personnes condamnées*
 - Other (Transfer of criminal proceedings ?) / *Autres (transfèrement des procédures répressives ?)*
4. Follow up and working methods / *Suivi et méthodologie*
5. Conclusion and closing of the meeting / *conclusion et clôture de la réunion*

APPENDIX III**LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****ITALIA / ITALIE**

Mr Eugenio SELVAGGI, la Corte di Appello, I – 00193 ROMA

AUSTRIA / AUTRICHE

Ms Barbara GOETH-FLEMMICH, Ministry of Justice, VIENNA

ESTONIA / ESTONIE

Ms Imbi MARKUS, Ministry of Justice, TALLINN

NETHERLANDS / PAYS-BAS

Ms. Linda BREGMAN, Ministry of Justice, THE HAGUE

PORTUGAL

Mme Joana GOMES FERREIRA, Procuradoria Geral da República, LISBOA

SLOVAKIA / SLOVAQUIE

Mr Branislav BOHÁČIK, Ministry of Justice, BRATISLAVA

SWEDEN / SUEDE

Mr Per HEDVALL, Ministry of Justice, STOCKHOLM

SWITZERLAND / SUISSE

M. Jenni ERWIN, Office fédéral de la justice, BERNE

RUSSIA / RUSSIE

Mr Vladimir P. ZIMIN, Office of the Prosecutor General, MOSCOW

SECRETARIAT

Department of Crime Problems / Service des Problèmes criminels

Fax +33-3-88 41 27 94

Ms Bridget O'LOUGHLIN, Head of the Division of Criminal Justice / Chef de la Division de la Justice Pénale

TEL. +3-3-88 41 23 08

E-mail bridget.oloughlin@coe.int

Mr Humbert de BIOLLEY, **Secretary to the Committee / Secrétaire du Comité**

TEL. +33-3-90 21 47 03

E-mail humbert.debiolley@coe.int

Mrs Marose BALA-LEUNG, Administrative Assistant / Assistante Administrative

TEL. +33-3-88 41 30 84

E-mail marose.bala-leung@coe.int