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EUROPEAN COMMITTEE ON CRIME PROBLEMS
COMITÉ EUROPÉEN POUR LES PROBLÈMES CRIMINELS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
COMITÉ D'EXPERTS
SUR LE FONCTIONNEMENT
DES CONVENTIONS EUROPÉENNES DANS LE DOMAINE PÉNAL
(PC-OC)

Selected PC-OC Forum discussions as regards extradition

Double criminality in abstracto or in concreto

Lapse of time

Double 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 criminal 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 Ordnungswidrigkeiten). 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 drink 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 than 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 cooperation? Shouldn't we look at things in a dynamic way? Shouldn't it 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?

12 January, 2011, Eugenio Selvaggi (Italy)

Lapse of Time

According to Article 10 of the CoE Convention, extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

The Swedish Act on Extradition states that extradition may not be granted if penalty for the offence would be time-barred according to Swedish law.

The Swedish Supreme Court has ruled that, when deciding upon a request for extradition for the execution of a sentence, Swedish authorities have to examine lapse of time in Sweden both with regard to punishment and prosecution.

In my opinion it should suffice to examine the lapse of time with regard to punishment in these cases.

I would be grateful for input on how this matter is handled in other MS.

Best regards

Per Hedvall (Sweden)

19 March 2012

Dear Per,

According to Section 393(d) of the Criminal Procedure Code of the Czech Republic, extradition is inadmissible "if criminal prosecution or enforcement of sentence are statute barred under Czech law". I don't think there has been any jurisprudence of Czech courts concerning your specific question but in my view, Section 393(d) should be interpreted to mean lapse of time in relation to criminal prosecution if the extradition is requested for prosecution and lapse of time in relation to enforcement of sentence if the extradition is requested for enforcement of sentence. Of course, we apply self-executing international treaties directly, with precedence over domestic law, so any treaty provision to the contrary would have precedence.

In my view, lapse of time in relation to both enforcement of sentence and prosecution would come into play only if extradition is requested for enforcement of a sentence imposed in absentia - prosecution must still be possible (including not statute barred) for a guarantee under Article 3 of the Second Additional Protocol to be effective.

Best regards

Miroslav Kubicek (Czech Republic)

Dear Per,

I cannot see why lapse of time with regard to prosecution would be relevant in the case you extradite on the basis of an irrevocable judgment/sentence. The basis of the request is the judgment, not the prosecution. Unless, as Miroslav wrote, the request is done in a in-absentia case and you consider the request as being for the purpose of prosecuting someone. Something to discuss during the Mod?

Selma de Groot (Netherlands)

Dear Per

Like our friends in the Czech Republic and in Holland lapse of time with regard to the Prosecution would only be relevant, in Portugal, in cases when there has been a judgement, if this judgement reveals to have been a judgement in absentia. Otherwise I don't think you should confirm lapse time related to the Prosecution in a case where trial took place already. We don't have case law on this...

Regards

Joana Ferreira (Portugal)