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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)

Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests

Compilation des réponses au questionnaire sur le moment de référence à prendre en considération en cas de double incrimination concernant une demande d'extradition

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INTRODUCTION

During its 16th meeting on 9-11 October 2013, the PC-OC Mod discussed the reference moment to be applied when considering double criminality as regards extradition requests and decided to invite PC-OC experts to reply to the following short questionnaire:

When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

□ *the offence was committed*
□ *the extradition request is received*
□ *the decision on the extradition request is made*

Please provide comments if appropriate.

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Durant sa 16me réunion du 9 au 11 octobre 2013, le PC-OC Mod a eu une discussion sur le moment de référence à prendre en considération en cas de double incrimination concernant une demande d'extradition et a décidé d'inviter les experts du PC-OC à répondre à la question ci-après :

Pour déterminer le moment de référence à prendre en considération en cas de double incrimination concernant une demande d'extradition, considérez-vous le moment où:

□ *l'infraction a été commise?*
□ *la demande d'extradition a été reçue?*
□ *la décision sur la demande d'extradition a été prise?*

Merci de commenter le cas échéant.

TABLE OF REPLIES / *TABLEAU DES RÉPONSES*

Extradition requests: reference moment applied when considering double criminality

Demande d'extradition: moment de référence considérée pour la double incrimination

State/Etat	When offence was committed *Quand l'infraction a été commise*	When request is received *Quand la demande est reçue*	When decision is made *Quand la décision est prise*	Comments *Commentaires*
Albania			X	X
Andorra			X	
Austria			X	X
Azerbaijan	X	X	X	X
Belgium			X	X
Bosnia and Herzegovina			X	
Croatia			X	
Czech Republic	X	X	X	X
Denmark[1]	X		X	
Finland		X		X
France	X			X
Georgia	X	X	X	X
Germany			X	X
Greece[2]	X	X	X	X
Hungary	X		X	X
Iceland[3]		X		
Ireland[4]	X	X		X
Italy[5]			X	X
Latvia	X		X	X
Moldova	X			
Netherlands			X	X
Norway		X	X	
Poland[6]	X			
Portugal[7]	X	X	X	X
Serbia			X	X
Romania			X	
Russian Federation	X		X	X
Slovak Republic	X			X
Slovenia[8]	X		X	X
Spain	X			
Sweden			X	
Switzerland			X	X
United Kingdom	X			X
Ukraine[9]	X	X	X	X

[1] View of the MoJ: no clear answer in legislation or case law./*Opinion du MdJ: pas de réponse claire dans la législation ou la jurisprudence.*
[2] No legal provision as regards the reference moment.*Il pas de législation concernant le moment de référence.*
[3] View of the authorities (case-law is uncertain). Opinion des autorités (jurisprudence incertaine)
[4] The reference moment applied is one of those indicated./ Le moment de référence appliqué sera l'un des deux indiqués.
[5] Expert's opinion. *Opinion de l'expert*.
[6] View of the authorities. *Opinion des autorités*.
[7] Expert's opinion. *Opinion de l'expert.*
[8] Reply based on scarce case-law. *Réponse basée sur une jurisprudence peu abondante.*
[9] Expert's opinion. *Opinion de l'expert.*

ALBANIA

Referring to three options below, regarding the moment to apply the principle of double criminality the reply for Albania would be the third one: the moment when the decision on the extradition request is made ", which includes in it as well the second option when the extradition request is received, as far as the request has not been refused by the central authority of the Requested state and the request has been sent to the court to consider the decision.

Regarding the first option it is important that the offence be provided by both states at the moment when the request has been submitted.

"When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

□ the offence was committed

□ the extradition request is received

✓ the decision on the extradition request is made

ANDORRA

Pour l'Andorre, si bien il n'existe actuellement aucune prévision légale ni jurisprudentielle, la réponse serait la troisième option: le moment à prendre en considération en cas de double incrimination concernant une demande d'extradition serait celui où la décision sur la demande d'extradition serait prise.

AUSTRIA

According to the jurisprudence of the Austrian Supreme Court the moment of the decision on extradition is applied when considering double criminality. It is not required that the facts underlying the extradition request were punishable in Austria when they were committed, it is sufficient that these facts are punishable at the moment when deciding on extradition. The non-retroactivity principle does not apply in procedural law and extradition law (which is considered as part of procedural law).

AZERBAIJAN

According to the Art. 496.2 of the Code of Criminal Procedure of the Republic of Azerbaijan which determines a basic rule that has to be referred to when deciding cases on extradition: “a person shall be extradited in respect of the deeds which are considered as criminally punishable under the legislation of the Republic of Azerbaijan and of the requesting state and can be punished by the deprivation of liberty for the period of at least 1 (one) year or by a more severe penalty”.

This, first of all, means that the act for which the extradition is requested must be a criminal offence within the meaning of the domestic law. Therefore our judicial authorities would start to examine the case by considering the time when the criminal offence was committed, in order to determine whether the act is regarded as a crime by domestic legislation or not.

Moreover, according to the Art. 496.4 of CPC one of the grounds to refuse in extradition of a person is “if, at the time of receipt of the request for extradition, under the legislation of the Republic of Azerbaijan the criminal prosecution cannot be initiated or the judgment be enforced because of lapse of time or on other legal grounds”. Which means that the extradition would be granted only if at the time of receipt of the request for extradition the act which prompted it still meets all requirements of domestic legislation necessary for criminal prosecution of any act (lapse of time, nullum cimen sine lege, non bis in idem etc.).

Additionally, it should be mentioned that if at the time of making a decision on a case the court discovers that any of requirements of criminal legislation is not fulfilled the extradition will not be granted, as well.

Bearing in mind all abovementioned, we can draw a conclusion that in Azerbaijan in order to grant the extradition the act must be considered as a crime from the moment that it has been committed until the moment when the final decision on the case is made. The requirement of double criminality should be met at all three moments mentioned in the question.

BELGIUM

When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:
□ the offence was committed
□ the extradition request is received
X the decision on the extradition request is made

Please provide comments if appropriate.

In accordance with the Belgian extradition Act and case law on the issue, double criminality is evaluation in abstracto only at the time of the extradition decision. That moment only is relevant for establishing the existence of an offence or offences in accordance with Belgian law when the facts /acts are re-qualified under the Belgian law.

The reason for this 'reference time' is that extradition does not involve any transfer of jurisdiction over the – by definition – foreign matter. The prosecution or the sentence is and remains the prosecution or the sentence of the requesting State. The legality principle can thus only have its full effect in that State.

In accordance with article 1 of the Convention (1957), Belgium adheres to the "widest extent" notion of cooperation, in this case extradition, which means that the decision-making process on an extradition request should refrain from acts that may prevent the requesting state to exercise its – in principle even exclusive – jurisdiction over the facts, i.e. mutatis mutandis offences in that state at the time they were (allegedly) committed.

Off course, the "moment when the decision on the extradition request is made" is actually not one single moment since the extradition procedure contains a chronological series of decisions. First in a judicial stage, a decision is made with respect to the conditions of the extradition and the – absence – of an exception to extradition. However the sole relevant decision is that of the Executive ('the Governement'), in practise the Minister of Justice. If, at that moment, the facts / acts contained in the extradition request are punishable in accordance with article 2 of the Convention, the double criminality requirement is fulfilled.

Additional Comments / *Commentaires supplémentaires*

The heart of the matter is that extradition, just like MLA in all its varieties, is a secondary type of cooperation and not a primary type of cooperation such as the transmission of prosecutions (1972 Convention), the transmission of the execution of sentences – any type of sentence for that matter (1970 Convention and the variety whereby sentences and measures involving the deprivation of liberty are concerned AND the sentenced person him or herself is transferred, the 1983 Convention and let's not forget the obscure 1964 Convention).

This distinction is based upon the very core of cooperation: jurisdiction. (PC-OC's motto could be: "No Cooperation without Jurisdiction, No Cooperation without Communication").
The big question is: does jurisdiction "move"? Is it relinquished ('transferred') or not? That is the first and sometimes also the last question when cooperating. When jurisdiction 'moves', we are in primary cooperation, when it does not, we're in (mere) secondary cooperation.

The distinction was devised by the Dutch scholar Louk Hulsman in his landmark paper that was written for the predecessor of the CDPC, the CEPC back in 1971 while he was the president of the committee. The document's title is « Les Conventions européennes en matière d'entraide pénale comme instrument d'une politique criminelle commune » and bears the reference DPC/CEDPC (71) 8, 10 September 1971. I assume there is an English version available. It is in fact a more developed version of an earlier contribution by Hulsman in the Liber Amicorum in honour of another Dutch scolar J.M. Van Bemmelen (1965).

The Hulsman theorema, (or paradigm) as I would call his ideas, on the fundamental distinction between two mayor types of (old) cooperation and newer (post-WW II) cooperation founded on what one could define as "pre-emptive types of communal legal spaces" (see the early conventions re. primary cooperation or attempts thereto at the Benelux-level).

Now coming to our issue: departing from the above mentioned legal scenery or rather foundation of cooperation in criminal matters – I cannot but conclude that double criminality and automatically all that is related thereto or develops from that point such as lapse of time should be reviewed in a purely abstract way. The legality principle (nullum crimen & nulla poena sine lege) in that respect should be seen apart from jurisdiction that is not obtained, since the requesting state does not have intention nor the legal basis to relinquish its own – exclusive – jurisdiction; The requested State thus cannot and should not assume that foreign jurisdiction and impose its domestic legality principle to the facts that are and remain under another sovereign state's jurisdiction.

In other words: one should not refuse to cooperate at the secondary level (extradition & MLA) for lack of double criminality – or double absence of lapse of time – when the facts would have been committed on your own territory or would have been under your own extraterritorial jurisdiction at the time the facts were – allegedly – committed. The simple yet fundamental reason is that the facts "are" another State's facts only.

Consequently, all this will be completely the opposite when, for instance for reason of nationality you are obliged to refuse extradition and article 6§2 of the 1957 Convention would apply and you would offer to prosecute the facts yourself, thus applying the general principle of international law, 'aut dedere, aut judicare'. From there, the evaluation of double criminality in concreto would then, possibly, prevent you from prosecuting since the legality principle would not be met. The very same applies for a potential application of 'aut dedere, aut exequie'.

The more contributions I read, the ever more complex the Hulsman theorema becomes. Incredibly complex issues arise such as, at mere first sight, the interference of extraterritorial jurisdiction, esp. when some states adhere to a very limited or even narrow concept of extraterritorial jurisdiction. The difference between the transfer of prosecution and the transfer of sentences, the very subtle approach of the transfer of surveillance (1964 Convention, esp. parts III and IV), the material (double criminality) versus (?) the procedural (lapse of time) application of the theorema and at the EU-level of mutual recognition, the relevance of the Hulsman's theorema. I see enough material for more than a couple of PhDs here.

To be continued…

BOSNIA AND HERZEGOVINA

Regarding the Question related to reference moment to be applied when considering double criminality in respect of an extradition request, the reply for Bosnia and Herzegovina would be:

"When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when":

□ the offence was committed

□ the extradition request is received

✓ the decision on the extradition request is made

CROATIA

When determining the reference moment to apply the principle of double criminality in respect of an extradition request, we consider the moment when

□ the decision on the extradition request is made.

CZECH REPUBLIC

The Czech Republic, when considering dual criminality in extradition context, looks at the specific conduct (facts of the case) on which the request for extradition is based. For any conduct to be an offence today, it needs to have been an offence also when it was committed and continuously up to the moment of surrender of the person to the authorities of the requesting State. Since the offence for which extradition is requested usually falls beyond the jurisdiction of the Czech Republic, we apply the so-called "analogical transposition" approach, i.e. we look at the elements of the offence as if the offence were committed in the Czech Republic (important especially in relation to the lapse of time and possible interruption of limitation periods by procedural acts of the authorities of the requesting State). However, the "analogical transposition" has been, so far, used only geographically (jurisdiction) and not also time-wise (temporal application). Therefore, only if the conduct would have been an offence under the laws of the Czech Republic at the time it was committed and continuously thereafter it could be also an offence at the time of extradition. The Supreme Court of the Czech Republic recognized this conduct-based approach on a number of occasions.

Our conduct-based approach means that interpreting Article 2(1) of the European Convention on Extradition in a way that would allow extradition for conducts that would not have been an offence under Czech laws at the time of their commission would violate the ban on retroactivity. If a specific conduct would not be an offence at the time of its commission, it cannot become an offence later. Any change in substantive Criminal Law can apply only to conducts committed after such a change enters into force, unless it is actually beneficial for the offender. A change in laws is relevant only to similar conducts committed afterwards.

Furthermore, an approach based not on conduct but on legislation without regard to the provisions of the legislation on its temporal application would create a situation in which persons who committed the same conduct (e. g. as co-perpetrators) could be treated differently if one person's extradition is requested by the requesting State and the other person's extradition not (for example because that other person is a national of the requested State). The first person would be punished in the requesting State, the other could not be punished in the requested State.

DENMARK

The question on the reference moment to be applied when deciding on double criminality in extradition matters has not been answered clearly in the Danish legislation on extradition or in the Danish case law.

However, it is the clear view of the Danish Ministry of Justice that *both* the moment when the offence was committed *and* the moment when the decision regarding extradition must be applied when deciding upon the double criminality criteria.

FINLAND

The reference moment for assessing dual criminality in Finland is the moment of the receipt of the extradition request. In the rarest of cases where the criminalization were to come into force after the receipt of the request but before the Minister's signature we would consider the latter point of time decisive.

The proponents of the time of the commission of the offence usually refer to the legality principle (nullum crimen sine lege) which, I think, lends itself to serious criticism. Namely, the purpose of extradition is to assist another state to realize criminal responsibility by handing over a person to that state for legal proceedings. The legality principle can come under scrutiny only in the requesting state. It has no legal relevance in the requested state - and how could it have - since the person in question is not suspected of any offence in that state. Thus the legality principle can not have any impact on the selection of the reference moment for determining dual criminality.

FRANCE

Pour déterminer le moment de référence à prendre en considération en cas de double incrimination concernant une demande d'extradition, considérez vous le moment où:

X l'infraction a été commise?
□ la demande d'extradition a été recue?
□ la décision sur la demande d'extradition a été prise?

Merci de commenter le cas échéant.

La législation française (article 696-3 du Code de procédure pénale) dispose que « en aucun cas l'extradition n'est accordée par le gouvernement français si le fait n'est pas puni par la loi française d'une peine criminelle ou correctionnelle ». La loi ne règle toutefois pas la question du moment de l'appréciation de l'incrimination en droit français des faits objet de la demande d'extradition.
La jurisprudence est venue régler cette difficulté en énonçant notamment qu'il n'y a pas double incrimination lorsque les faits n'étaient pas, à l'époque de leur commission, incriminés en France, car en vertu du principe d'ordre public de non-rétroactivité de la loi pénale, ces faits n'étaient pas susceptibles de sanction pénale en droit français (Cour d'appel d'Aix-en-Provence, 24 novembre 1999).

GEORGIA

Extradition procedures in Georgia consist of 2 stages. Initially, the court examines the admissibility issue (first stage) and later the Minister of Justice makes final decision on extradition (second stage).

Stemming from the above mentioned, when applying the dual criminality principle, Georgia is in favor of the following approach:

1) If the extradition request refers to the crime which was not punishable in Georgia at the time of its commission in a foreign state, the competent Georgian authorities refuse to grant extradition (no matter whether the crime is punishable when the request is received or when the decision is made). It means that in such cases Georgia considers the moment when the crime was committed.
2) If the extradition request refers to the crime which was punishable in Georgia when it was committed in a foreign state, but at the time of receiving the request it is already decriminalized, Georgia refuses to grant extradition without addressing the court with the request for examining the admissibility issue. I such cases, Georgia considers the moment when the extradition request is received.
3) If the extradition request refers to the crime which was also punishable in Georgia when it was committed in a foreign state as well as when the extradition request was received, however, at the time of making decision on extradition by the Minister of Justice (at the last stage of proceedings) the crime appears to be already decriminalized, Georgia also refuses to grant extradition. In such cases, Georgia considers the moment when the decision on the extradition request is made.

GERMANY

The German Act on International Cooperation in Criminal Matters provides in its section 3 para. 1:

“Extradition shall not be granted unless the offence is an unlawful act under German law or unless mutatis mutandis the offence would also constitute an offence under German law.”

According to the German legal practice the principle of double criminality has to be examined during the whole extradition procedure until the actual surrender of the person sought. The competent authority (court and ministry) can only declare an extradition admissible if double criminality is existent at the moment when the decision on the extradition request is made and persists until the moment of the actual surrender.

However, according to German law it is not necessary that double criminality is given at the moment when the offence was committed. That means that extradition has to be granted even if the offence was not punishable under German law at the time it was committed.

These principles have been confirmed by the German Federal Constitutional Court (BVerfG, 2. Senat, 5.11.2003, 2 BvR 1506/03). The Court stated that they do not violate German constitutional law as far as the legal principle that measures should not have retroactive effects is concerned.

GREECE

Art. 437 of the Greek Criminal Procedural Code introduces the “double criminality” principle.

It is true that there is not any clear provision on the exact time, when double criminality must be examined or verified.

As a general rule, art. 2 of the Greek Penal Code provides that any person can be tried and convicted for having committed an offence, if this offence is punishable at the time this offence was committed AND at the time the defendant is being tried and possibly convicted.

As a result, “criminalization” of a certain act, according to our domestic legal order, exists when both the above requirements are met.

If an act or the facts are not punishable either at the time of the commission or at the time of the trial, “criminalization” does not exist.

My opinion is that this scheme must be utilized to provide the appropriate answer regarding the extradition matters and the subject in discussion. Domestic criminality for an offence does not exist if this offence used to be punishable, when it was committed, but it is not anymore, when the extradition request is being sent and examined or the decision on the extradition request is being made. Domestic criminality does neither exist if the offence is punishable when the extradition request is being sent and examined or the decision on the extradition request is being made, but it was not when the offence was committed.

HUNGARY

Section 2 of the Act C of 2012 on the Criminal Code states that *criminal offenses shall be adjudicated under the criminal law in effect at the time when they were committed.*

(2) Where an act is no longer treated as a criminal offense, or if it draws a more lenient penalty under the new criminal law in effect at the time when it is adjudicated, this new law shall apply.

(3) The new criminal law shall apply with retroactive effect in connection with acts which are punishable under universally acknowledged rules of international law, if such acts did not constitute a criminal offense under Hungarian criminal law at the time when they were committed.

Section 5 of the Act XXXVIII of 1996 on International Mutual Assistance in Criminal Matters states that *unless otherwise provided for under this Act, requests for mutual assistance shall be executed or made where the act is punishable under both the law of Hungary and the law of the foreign state.*

This means that Hungary considers the moment when the offence was committed when applying the principle of double criminality. So if the extradition request refers to an act that was also punishable in Hungary when it was committed in the Requesting State, Hungary grants the extradition.
However if the act is no longer a criminal offense at the moment when the decision on the extradition request is made, Hungary refuses to grant extradition. So in the latter case Hungary considers the moment when the decision on the extradition request is made.

ICELAND

Icelandic authorities would refer to the moment the extradition request is received. However, it is uncertain how the court would interpret the double criminality condition.

IRELAND

For extradition requests, there is a choice – the reference moment to apply the principle of double criminality is either the date on which the request for extradition is made (which will usually be a few days before it is actually received) or alternatively, the date on which the offence, technically the act concerned was committed or alleged to have been committed - section 10(3) of the Extradition Act 1965 as amended. If one of these 2 alternatives is met, that is sufficient for establishing double criminality.

ITALY

Starting from the basic principles, I would say the following:

Extradition means co-operation granted from one State (Requested State) to one other State (Requesting State) in order to allow the latter State to "make justice", given that the presence of the person concerned is essential.

What the requested State is asked to do is to surrender the person sought.

The principle is that double criminality is required, because that is a prerequisite to allow the deprivation of liberty of the person concerned.

Double criminality means that extradition is possible if the fact (crime) for which the fugitive is sought is a crime should that person have committed it in the Requested State (whatever the *nomen juris* might be).

BUT: we should keep separate this concept depending on whether we are exercising our own (domestic) jurisdiction OR we are in the domain of extradition, which does not mean exercising jurisdiction but only allowing others to exercise their jurisdiction.

In short: if I know that a fact is not provided for as a criminal offence in the State where the fugitive went, I will not ask for extradition. But once I have been aware of the fact that such State did introduce that specific offence (which has become a crime) I do not see any reason not to ask extradition: it is a crime in the Requesting country and it is a crime in the Requested country too.

So it is possible to extradite.

As to the moment when the condition of double criminality is to be taken into account, Joana (Portugal) refers to 3 scenarios.

no.1: my answer would be: at the time of the decision is made. Of course if at the time of the receipt of the request there is no double criminality, it is possible for the Minister (or other competent authority) to immediately refuse extradition, without sending the case to the court, because the condition is not met (even if there is a bill pending before the Parliament which prides for the introduction of the new offence). But if at the moment of the request the condition is met, then extradition is possible (or even mandatory, unless one other ground for refusal comes out). <u>but no reference to the time when the offence had been committed.</u>

no.2: if after the receipt of the request the offence is not an offence <u>anymore</u> in the Requested State, then I see no ground to grant extradition, which is to be refused (there is not double criminality). Should we say that it is at the time where the offence was committed that we have to refer, then in such a case we should be obliged to extradite (because of double incrimination at the time when the offence had been committed), which is not possible, in my view and in the light of the 1957 convention.

no. 3: see sub points 1 and 2.

LATVIA

Criminal Procedure Law part 1 Section 696 states that
(1) A person who is located in the territory of Latvia may be extradited for criminal prosecution, litigation, or the execution of a judgment, if a request has been received from a foreign state to extradite such person regarding an offence that, in accordance with the law of Latvia and the foreign state, is criminal.

This means that Latvia considers only the day when the offence is committed.

In case if during the extradition request examination the offence is ceases to be a criminal it would be obligatory circumstance to refuse the extradition.

MOLDOVA

When the offence was committed is the reference moment to apply the principle of double criminality in respect of an extradition request.

NETHERLANDS

The High Court of the Netherlands (for example HR, 18 November 2003, LJN AH8601) determined that the Netherlands can grant extradition requests concerning facts that weren't punishable in the Netherlands at the time the facts occurred. The only requirement is that the facts have to be punishable at the time the extradition is requested.

In practice this means that if it is unclear whether there is dual criminality, the court(s) will assess whether the facts are punishable in the Netherlands. However if, at the time the request is received, it is obvious that the committed offences are not punishable in the Netherlands, the Minister will inform the requesting state immediately that the extradition can not be granted and the case will not be brought to court..

The High Court ruled in an extradition case concerning a Dutch national that even a Dutch national could be extradited for facts that weren't punishable in the Netherlands at the time the facts were committed (The Netherlands only extradites its own nationals when the requesting state guarantees that the Dutch citizen is able to serve his sentence in the Netherlands after a conversion of the foreign sentence into a Dutch sentence).

In this case the court had followed the defense which stated that the extradition had to be refused, because of the fact that the Dutch citizen could not be transferred back to the Netherlands since conversion of a sentence requires dual criminality. The High Court overruled the court and determined that dual criminality regarding the conversion of the sentence also had to be assessed against the law and regulations which are valid at the moment that the request for transfer of a sentence is treated in the Netherlands (Hoge Raad, 20 may 2003, NJ 2003, 725).

NORWAY

When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

□ the offence was committed
X the extradition request is received
X the decision on the extradition request is made

POLAND

Initially we are of the opinion that the moment when the offence was committed should be the reference moment to apply the principle of double criminality in respect of an extradition request. However in practice such question has not appeared in our cases.

PORTUGAL

This not an easy question, better the question is easy, the answer is not.

Unlike the moment when nationality must be verified, that is expressly clear in our procedure, there is not a word on when must double criminality be verified.

My interpretation is that several situations can take place:

1. If the facts were not punishable in Portugal when they were committed, I don't think we can grant extradition. If the person would have committed the facts in Portugal, instead of abroad, he or she would not be punished, so refusal of extradition seems a logic consequence.
2. The same solution seems to be applicable if the facts were punishable when they were committed but they are not punishable anymore when the request was received. Double incrimination, in this case, cannot be found and the refusal seems inevitable.
3. Finally according with our system, the political decision that is made immediately after the receipt of the request is not mandatory for the Courts. So, in case there was double incrimination when the request was received, and therefore it was considered admissible, but during the judicial phase of the procedure the facts became not punishable, I don't believe that this extradition would be granted by any Court.

So, in brief, our Law does not say when is the double incrimination issue considered and my feeling is that it could be considered in any one of the situations mentioned in your mail, depending on the moment when the facts became not punishable.

May be we are wrong but this is our first approach to the question.

ROMANIA

Our reply to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition is:

When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

□ the offence was committed
□ the extradition request is received
→ **the decision on the extradition request is made**

RUSSIAN FEDERATION

In the Russian Federation application of “double criminality” principle is a compulsory condition when extradition issue is considered. The norm on prohibition to extradite persons, who committed acts which are not recognized in the Russian Federation as crimes, is fixed by Article 63 of the Constitution of the Russian Federation. Article 462 (1) of the Criminal Procedure Code of the Russian Federation, as well as all international treaties of the Russian Federation contain this respective provision.

It should be noted that the Constitutional Court of the Russian Federation construes the Constitution of the Russian Federation. At present there is no official interpretation of a constitutional norm on prohibition to extradite persons for commission of acts which are not recognized in the Russian Federation as crimes.

In practice principle of double criminality is taken into consideration in the Russian Federation when decision on extradition is made. Also the Russian Federation will not extradite a person in case, at a moment when a crime was committed, an act with regard to which extradition is sought was not a penal one in the Russian Federation.

Besides, subject to the constitutional norm on prohibition to extradite persons for commission of acts which are not recognized in the Russian Federation as crimes, it can be assumed that if at the time of physical extradition of a person the act, commission of which entailed extradition, is decriminalized in Russia or a Requesting country, this person will not be transmitted (and decision on his extradition will be cancelled). At the same time Russia has not had such cases in its practice.

SERBIA

Referring to three options below, regarding the moment to apply the principle of double criminality the reply for the Republic of Serbia would be the third one: the moment when the decision on the extradition request is made", but the competent court will also take into the consideration the first option - when the offence was committed, because of the Article 5 of the Criminal Code of the Republic of Serbia, which prescribes that the law in force at the time of committing of criminal offence shall apply to the offender.

"When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

□ the offence was committed

□ the extradition request is received

✓ the decision on the extradition request is made

SLOVAK REPUBLIC

Here is the reply for the Slovak Republic:

"When determining the reference moment to apply the principle of double criminality in respect of an extradition request do you consider the moment when:

x **the offence was committed**
□ the extradition request is received
□ the decision on the extradition request is made"

Furthermore, here is the Article 2 of the Criminal Code of the Slovak Republic:

„Section 2

Time Competency

(1) The criminal liability of an act is assessed and the punishment is imposed under the Law effective at the time of its commission. If several laws come into effect during the period of the commission of an act and the delivery of the judgment, the criminal liability of an act is assessed and the punishment is imposed under the Law that is more favorable to the offender.

(2) An offender may have a punishment imposed that is permitted by the Act effective at the time when deciding on the criminal offence, if such is more favorable to the offender"

SLOVENIA

In the Republic of Slovenia the extradition is divided into two stages: court and administrative stage. After receiving the extradition request and the extradition documentation, the competent court evaluates whether the preconditions for granting extradition, required by the European Convention on Extradition of 1957 and Criminal Procedure Act of Republic of Slovenia (CPA), are fulfilled.

With the reference to the provision of the Criminal Procedure Act of Republic of Slovenia which determines the required preconditions for granting extradition (point three of the first paragraph of Article 522 CPA), the act which prompted the request for extradition must be a criminal offence within the meaning of the domestic law as well as of the law of the country in which it was committed.

Bearing in mind the circumstance that the Criminal Procedure Act of the Republic of Slovenia does not explicitly determines the moment, when the double criminality should be considered, it is within the jurisdiction of the courts to decide when the double criminality is to be considered and to form the jurisprudence in this field. It derives from the existing case law that our courts considered double criminality at the time when deciding if the preconditions for the extradition were met.

It should be noticed that the court jurisprudence regarding the discussed matter within extradition procedures in Slovenia is not yet broadly established, since there has not been many cases involving the question of double criminality. But even out of these few cases it is evident that courts consider the double criminality as one of the conditions for the extradition and that if it does not exist, the extradition cannot be granted and from one recent judgment of the Supreme Court of Republic of Slovenia of November 15, 2012 it is evident that the Court considered the double criminality at the time when the criminal offence was committed.

SPAIN

When determining the reference moment to apply the principle of double criminality in respect of an extradition request Spain considers the moment when the offence was committed.

SWEDEN

Sweden applies the moment the decision on extradition is made as the reference moment when considering double criminality.

SWITZERLAND

En Suisse, le moment de référence à prendre en considération en cas de double incrimination en matière d'extradition est celui de **la décision sur la demande d'extradition**.

Selon la conception suisse – confirmée par la jurisprudence du Tribunal fédéral suisse et la doctrine – la condition de la double incrimination s'examine selon le droit en vigueur dans l'Etat requis au moment où est prise la décision sur la demande de coopération judiciaire *(et non selon le droit en vigueur au moment de la commission de l'éventuelle infraction ou à la date de la demande de coopération judicaire*). Par conséquent, l'exigence de la double incrimination ne peut pas faire obstacle à l'extradition lorsque, entre le moment de la commission des faits et celui où l'autorité suisse compétente (à savoir l'Office fédéral de la justice) examine cette condition, le droit suisse a été modifié dans un sens favorable à la double incrimination. En effet, il serait choquant de voir la Suisse refuser l'extradition, sous l'angle de la double incrimination, pour des faits qui seraient aussi réprimés en Suisse au moment où est prise la décision relative à l'extradition avec pour conséquence de voir le fugitif échapper à toute poursuite pour un comportement qui serait à ce moment punissable dans l'un et l'autre Etat.

Par ailleurs, nous partageons l'avis exprimé par M. Erik Verbert (Belgique), notamment en ce qui concerne la nature juridique de la procédure d'extradition (courriel du 30 octobre 2013).

Pour de plus amples informations, nous vous renvoyons au document ci-joint (en anglais).

Double criminality in extradition procedures

According to Swiss law, doctrine and jurisprudence, the reference moment to apply the principle of double criminality in respect to an extradition request is the decision on the extradition request.

The examination of the double criminality condition is based on the applicable law in the requested State (Swiss criminal law) at the moment of the extradition decision. In other words: The law applicable at the moment of the commission of the act or at the moment of the receipt of the extradition request is not relevant for Swiss authorities in relation to the double criminality condition.

In practice this means:

1. In case the Swiss criminal law would be modified during the extradition procedure – the facts would not be punishable anymore by Swiss penal law – the extradition procedure must be stopped, because the double criminality condition would not be fulfilled anymore.

2. In the opposite case – the Swiss criminal law would be modified during the extradition procedure and the facts would become, in the course of this modification, punishable by Swiss criminal law – an extradition would become possible.

As pointed out by Mr Eric Verbert, the double criminality condition is linked to the legal nature of the extradition procedure. The philosophy behind the Extradition Convention as well as behind the Mutual Legal Assistance Convention of the Council of Europe is to assist investigations and prosecutions conducted and pursued by the requesting State in relation to criminal offences. Against this background, the international cooperation in criminal matters – in particular the extradition – is considered as resulting from the international law. Therefore, the principles of criminal law applicable in the requested State in a national criminal procedure, for example the non-retroactivity principle or the lex mitior principle, should not apply in an extradition procedure. Otherwise, the requested State would not be in the position to comply fully with the obligation to extradite a person. This obligation was and should be the main goal of international cooperation.

UNITED KINGDOM

To answer the question, in UK law, the offence in the extradition request must be an offence in the UK at the time it was alleged to have been committed, in order to satisfy the requirement for dual criminality. An example of when this was considered in the UK courts was in the case of *Norris,* which involved a request from the United States. The House of Lords decided in March 2008 that the substantive offence of price fixing (without aggravating periods), the basis for the substantive charges against Norris in the US, was not a criminal offence in the UK at the time it was alleged to have been committed; therefore, it was not an extradition offence. Norris's appeal on this point was allowed, and he was extradited only on other charges.

UKRAINE

Ukrainian legislation does not provide for the time, beginning from which the principle of «double criminality» can be applied regarding the extradition process.

According to a general rule, under Article 4 Par. 2 of the Criminal Code of Ukraine the criminality and punishability of an act shall be determined by such law on criminal responsibility as was in effect at the time of commission of the act.

In my opinion if an offence at the time of its commission is not a crime, a person cannot be subjected to criminal prosecution, and therefore the request for extradition cannot be sent by the Requesting State.

The abovementioned principle also is fixed in Ukrainian legislation. Under Article 573 of the Code of Criminal Procedure of Ukraine the request for extradition of a person shall be sent only if under law of Ukraine at least one offence, for which the extradition is requested, is punishable by at least a year's imprisonment.

As it concerns the Requested State, to my mind, the act shall be qualified as a crime at any stage of the extradition procedure – if there is no crime, there is no extradition.

According to Article 589 Par. 1 subparagraph 2 of the Code of Criminal Procedure of Ukraine the extradition shall be refused in provided that an offense, for which the extradition is requested, is not punishable in the form of imprisonment. The abovementioned condition is examined by the central body as at the moment of receiving of the request for extradition, as well as during the extradition inspection is being conducted before taking a decision, during taking a decision by the central bodies of Ukraine, and even after the decision had been taken, if a person has appealed the decision to the court on the ground of the adherence to the condition.

If the crime, for which the extradition is requested, has been depenalized in the Requesting State or in the Requested State, the correspondent rules of internal legislation on retroactive effect of the law on criminal responsibility in time should be taken into consideration.

Thus, Article 5 of the Criminal Code of Ukraine provides that:
1. The law on criminal responsibility, which repeals the criminality of an act or lenifies criminal responsibility or in other way improves the situation of a person, shall be retroactive in time, that is it shall apply to persons who had committed relevant acts before that law entered into force, including the persons serving their sentence or those who have completed their sentence but have a conviction; 2. The law on criminal responsibility that criminalizes an act or increases criminal responsibility or in other way worsens the situation of a person shall not be retroactive in time; 3. The law on criminal responsibility, which partially lenifies criminal responsibility or in other way improves the situation of a person, and partially increases criminal responsibility or in other way worsens the situation of a person, shall be retroactive in time only in the part which lenifies the liability or in other way improves the situation of a person; 4. In the event that the law on criminal responsibility has been amended several times since a person committed an act stipulated by this Code, the law that abolishes criminality of an act or lenifies criminal responsibility or in other way improves the situation of a person shall be deemed as retroactive.

Therefore, in every separate case the examination of the double criminality of the crime, for which the extradition is requested, shall be thoroughly checked, taking into consideration the abovementioned circumstance.