

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 11/06/2015
[PC-OC/DOCS2015/PC-OC(2015)15]
<http://www.coe.int/tcj>

PC-OC(2015)15 BIL.

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

Measures of restriction in extradition cases

Replies to question posed by Mr Vladimir ZIMIN (Federation of Russia)

Contents

Question from Mr Zimin (Russian Federation).....	3
Réponse de l'Andorre.....	4
Reply from Cyprus.....	5
Reply from Germany.....	6
Reply from Ireland.....	7
Reply from Italy.....	8
Reply from Portugal.....	9
Reply from the Slovak Republic.....	10
Reply from Switzerland.....	14
Reply from United Kingdom.....	15

QUESTION FROM MR ZIMIN (RUSSIAN FEDERATION)

Dear PC-OC Members,

The Prosecutor General's Office of the Russian Federation is examining the issue of introducing some amendments into the Russian legislation, aimed at enhancing the efficiency of international cooperation on extradition.

In this connection I would appreciate to get your national experience of applying measures of restriction not involving custody (for example, bail or using electronic strap) to persons pending the decision of their extradition. Please, indicate as far as possible, whether only one measure of restriction is applied in such case or some 2 or 3 appropriate measures may be applied jointly. If there are legal provisions regulating the procedure of applying such measures of restriction please provide them (preferably in English).

Sincerely yours,

Vladimir Zimin,

First Deputy Chief, the General Department of International Legal Cooperation,

The Prosecutor General's Office of the Russian Federation

RÉPONSE DE L'ANDORRE

Pour ce qui concerne la Principauté d'Andorre, bien que notre Code de Procédure Pénale prévoit effectivement la possibilité d'adopter des mesures préventives telles que la caution ou bien le bracelet électronique, la réalité est que dans les cas de demandes d'extradition, normalement est toujours accordée la prison provisoire aux fins de garantir le correct aboutissement de la procédure d'extradition et donc la remise de la personne objet de la demande d'extradition.

REPLY FROM CYPRUS

Under Cyprus law, after the arrest of a fugitive, during the court hearing and pending the court decision on an extradition application, the court has the power either to order the fugitive's detention or release him on bail. Bail always includes ordering that his name be put on the Stop List by Interpol, to prevent his escape from the country and handing over his passports and all Identification documents to the Police or the Registrar of the court. Other terms of bail may be depositing a sum of money, a bank guarantee or other Security to the Registrar and appearing at a police station at prescribed times every day or week.

After a court decision to extradite, under Cypriot law, the fugitive must be kept in custody until surrender is effected. In case the court refuses extradition, we have recently amended our law to enable the court to impose bail terms, instead of releasing the fugitive unconditionally, so that he does not flee the country while we appeal the decision.

REPLY FROM GERMANY

In Germany, the Higher Regional Court (Oberlandesgericht) which has jurisdiction in extradition affairs, may suspend the execution of an extradition arrest warrant if less intrusive measure will ensure that the purpose of the provisional extradition detention or of the extradition detention is served (Sect. 25 para 1 of the Act on international cooperation in criminal matters-AICCM). The AICCM doesn't list itself the measures, but refers in Sect. 25 para 2 to Sect. 116 para 1 2. sentence of the Code of Criminal Procedure. There the following measures are listed:

- an instruction to report at certain times to the judge, the criminal prosecuting authority, or to a specific office to be designated by them;
- an instruction not to leave his place of residence, or wherever he happens to be, or a certain area without the permission of the judge or the criminal prosecuting authority;
- an instruction not to leave his private premises except under the supervision of a designated person;
- the furnishing of adequate security by the accused of another person.

This list of measures is not exclusive. The judge can order every measure that is suitable to serve as substitute to the execution of the arrest warrant. Other examples are the blocking of a bank account of the suspect, the delivery of the driving license, the identity card or the passport. The combination of two or more different measures is permitted. Often only the combination of measures allows the suspension of the execution of the arrest warrant. It's up to the judge to decide which measures are suitable.

The relevant legal provisions of the German law are:

Sect. 25 of the Act on international cooperation in criminal matters: Stay of execution of extradition arrest warrant

(1) The Oberlandesgericht may stay the execution of the extradition arrest warrant if less intrusive measures will ensure that the purpose of the provisional extradition detention or of the extradition detention is served.

(2) S. 116 (1) 2. Sentence, (4), ss. 116a, 123 and 124 (1), (2) 1. Sentence, (3) of the Strafprozessordnung as well as s. 72 (1), (4) 1. Sentence of the Jugendgerichtsgesetz shall apply mutatis mutandis.

Sect. 116 of the Code of criminal procedure

(1) ...

2. sentence: The following measures, in particular, may be considered:

Nr. 1: an instruction to report at certain times to the judge, the criminal prosecuting authority, or to a specific office to be designated by them;

Nr. 2: an instruction not to leave his place of residence, or wherever he happens to be, or a certain area without the permission of the judge or the criminal prosecuting authority;

Nr. 3: an instruction not to leave his private premises except under the supervision of a designated person;

Nr. 4: the furnishing of adequate security by the accused of another person.

REPLY FROM IRELAND

In Ireland, the only non-custodial option available to the Court is to remand an extradition subject on bail pending a decision on his/her case.

REPLY FROM ITALY

To the best of my recollection the point was discussed at a certain point of time in the PC-OC (but I do not remember when). However, the following would be the answer from Italy. In principle any type of pretrial/preventive measure may be adopted in extradition cases just as in ordinary national cases, i.e. prison, house arrest, electronic bracelet, order to present oneself to a police station (daily, once a week, twice a week etc.), order not to leave the State. As to national cases detention is to be the *extrema ratio* measure.

But in extradition cases the problem is that the requested State has to ensure the surrender of the person requested. Hence, usually the person sought is placed into detention. However our court of cassation stated that there should be a satisfactory motivation on the reason why the court deems that the only measure possible is detention. Usually the court of appeal (which is competent for extradition procedures) would motivate that there is a danger that the person sought may flee from the country and therefore impede the possibility for the requested State to comply with the request for co-operation. Of course the Italian courts would not require that the person is on the way to leave the country (e.g. because was found with a return ticket with him) but they would however require some element such as, for instance, the heavy sentence, in case of extradition for execution purposes.

To a certain extent the requesting State might argue that surrender became impossible due to the fact the person sought and arrested was then given the electronic bracelet and could therefore emphasize that the requested State did not properly comply with the request, which aims at the surrender of the person.

It might be interesting to look at the question from the other side, i.e. when a request for extradition is based on an order which is not an arrest warrant but a house arrest order. In such a case I remember that the point was made years ago and the answer was that the negative reply did not reside on the fact that the convention says "arrest warrant" (also the house arrest is an arrest warrant) but rather on the fact that not all jurisdiction may have house arrest in their legislation, with the consequence that in such a case the person would be in jail in the requested State and he/she would be subjected to a worst condition that he/she would be subjected to in the State requesting extradition. As a matter of fact, for a long time (I do not know what is the situation presently) France used to reply: only requested based on arrest/prison warrant, while Germany was more open and replied that should a request have been made on the basis of an house arrest, they would have adopted the same measure.

REPLY FROM PORTUGAL

In Portugal, like in Italy or Germany all coercive measures are applicable to an extraditable person, while the procedure concerning his or extradition is pending. Detention in view of the surrender but also bail, electronic bracelet, order to present oneself to a police station (daily, once a week, twice a week etc), order not to leave the State, are applicable according with our internal Law on international cooperation (article 38 nº6) (<http://www.gddc.pt/legislacao-lingua-estrangeira/english/lei144-99rev.html>).

When you read the Portuguese internal Law detention in view of extradition appears as exceptional (articles 38 and 39). However practice shows that, in order to keep conditions for a future extradition to be granted, many times the judicial decision is to deprive the extraditable person from his or her liberty. In such cases strict delays are established and that is why the requesting Court must confirm, in 18 days, that the request will be presented, this one must be presented until the 40th day. All other stages are very strictly ruled and the consequences, when a decision is not taken, are always the release of the person and, possibly, afterwards, the frustration of the extradition.

This is more or less our system.

A different question, which I'll probably raise during our next Plenary meeting, in order to have information on your practice is due to several recent decisions taken by the Court of Appeal of Lisboa. The reasoning is: when different measures are imposed, instead of a detention measure, that yet limit a person's liberty (like not to leave the Country or to appear in a Police station) are the delays established in article 16 of the COE 1957 Convention also applicable in such cases?

REPLY FROM THE SLOVAK REPUBLIC

In our national legal system, the replacement of custody is regulated in the Code of Criminal Procedure of the Slovak republic.

Anyway, it is important to say that we have two types of custody in our national law. The first one is custody used in the typical national criminal procedure and we can replace it in two ways:

1. Replacement of Custody with Guarantees, Promises and Supervision
2. Bail

The second one is custody in extradition procedure. We also have two types of custody here which is:

- a) preliminary custody (the purpose of the preliminary custody is to provide the presence of the detained person in the territory of the Slovak Republic until the State that is interested in the extradition of such person submits a request for their extradition) and
- b) extradition custody

Preliminary and extradition custody in the extradition procedure is not obligatory but according to our national legal system, once it **was imposed it is not possible to replace it**.

The situation is different in extradition according to the european arrest warrant because according to our national implementation act, the relevant judicial authority can replace the detention by any appropriate measure that is, according to the Code of Criminal Procedure of the Slovak republic, replacement with guarantees, promises and supervision and bail. As I said, this replacement is possible only in extradition according to european arrest warrant.

In addition, I enclose the legal provisions about the types of custody I have mentioned above.

In the typical national criminal procedure:

Replacement of Custody

Section 80

Replacement of Custody with Guarantees, Promises and Supervision

(1) If the reasons for custody under Section 71 Subsection 1 Paragraphs a) or c) are given, the court and, in the preliminary hearing, the judge for the preliminary hearing may leave the accused at liberty or release them to liberty, if

a) a public interest group or a trustworthy person offers to assume the guarantee for the future behaviour of the accused and for the fact that the accused shall be presented before the police officer, public prosecutor or a court upon a summons, and that they will always notify the police officer, public prosecutor or the court of their absence from their place of residence, and the court or, in the preliminary hearing, the judge for the preliminary hearing deems the guarantee, given the character of the accused and the nature of the heard case, sufficient and acceptable,

b) the accused gives a written promise to lead an orderly life, particularly not to commit criminal activities, and to fulfil the obligations and comply with the restrictions that are imposed upon them, and the court or, in the preliminary hearing, the judge for the preliminary hearing deems the promise, given the character of the accused and the nature of the heard case, sufficient and acceptable, or

c) with regards to the character of the accused and the nature of the heard case, the purpose of the custody may be achieved with the supervision of the probation and mediation officers over the accused.

(2) The court and, in the preliminary hearing, the judge for the preliminary hearing, shall notify the person who offers the assumption of guarantees under Subsection 1 Paragraph a) and fulfils the terms for its acceptance on the nature of the accusations and the facts justifying the custody; they shall instruct the accused on the guarantee. Simultaneously, the court and, in the preliminary hearing, the judge for the preliminary hearing, may impose the fulfilment of reasonable obligations and compliance with the restrictions upon the accused. If the accused is being prosecuted for a particularly serious crime, the reason for custody under Section 71 Subsection 2 Paragraph a)

through c) or e) is given, or the accused was remanded in custody under Subsection 3 or pursuant to Section 81 Subsection 4, they may accept the guarantee or promise or impose the supervision only if the exceptional circumstances of the case justify it. The accused shall always have an obligation imposed upon them to notify a police officer, public prosecutor, or the court that conducts the proceeding of any change of residence.

(3) If the accused was left at liberty or released to liberty under Subsection 1 and the public interest group or trustworthy person that offered the assumption of the guarantees justifiably deviates from the guarantee, the accused violates the given promise or fails to fulfil obligations, or violates the restrictions imposed to them by a court and, in the preliminary hearing, the judge for the preliminary hearing, or a probation and mediation officer announces that the supervision failed to fulfil its purpose, the court may, if there is a reason for custody under Section 71, remand the accused into custody and for that purpose, where appropriate, the presiding judge may even issue an arrest warrant; in the preliminary hearing, the police officer and the public prosecutor shall proceed under Section 86 and Section 87 Subsection 1 and the judge for the preliminary hearing shall proceed under Section 87 Subsection 2, or under Section 73. If the accused was remanded in custody after the previous release from custody to liberty, Section 78 shall apply to further custody.

(4) If the accused was remanded in custody in another case during supervision by the probation and mediation officer, the performance of the supervision shall be suspended. This does not concern the court or, upon the petition of the public prosecutor, the judge for the preliminary hearing under Subsection 3.

Section 81

Bail

(1) If the reason for the custody referred to in Section 71 Subsection 1 Paragraphs a) or c) is given, the court and, in the preliminary hearing, the judge for the preliminary hearing, may decide to leave the accused at liberty or release them from custody even if the accused paid the bail and the court or the judge for the preliminary hearing accepted it. If the accused is being prosecuted for a particularly serious crime, the reason for custody under Section 71 Subsection 2 Paragraphs a) through c) or e) is given, or the accused was remanded in custody under Subsection 4 or pursuant to Section 80 Subsection 3, they may only accept the bail if the exceptional circumstances of the case justify it. The accused shall always have an obligation imposed upon them to notify a police officer, public prosecutor, or the court of any change of residence. Another person may pay the bail with the consent of the accused but, prior to its acceptance, they must be instructed on the nature of the accusations and the facts for which there are reasons for custody. The accused and the person who paid the bail must be advised in advance on the reasons for which the bail may belong to the State.

(2) In regards to the character and the financial circumstances of the accused or those who offer to pay the bail for them, the nature of the act, its consequences and other circumstances of the case, the presiding judge or, in the preliminary hearing, the judge for the preliminary hearing, shall

a) determine the amount of bail and the manner of its payment and they shall serve the measure to those who are to pay the bail within the procedure under Section 72 Subsection 2 or Section 302 Subsection 2 through a measure, or

b) proceed under Section 72 Subsection 2 or Section 302 Subsection 2 without the issue of such measure.

(3) The court and, in the preliminary hearing upon the petition of the public prosecutor, the judge for the preliminary hearing shall decide that the bail belongs to the State, if the accused

a) flees, hides, or fails to notify on their change of residence, and thus prevents the delivery of the summons or other documents of the court, public prosecutor, or police officer,

b) affects the witnesses, experts, co-defendants or if they otherwise impede the clarification of facts important to the criminal prosecution,

c) deliberately fails to attend the summons for an act of the criminal proceedings, the performance of which is impossible without their presence,

d) continues in the criminal activity or attempts to complete a criminal offence which they initially failed to complete or which they premeditated or threatened to perform,

e) fails to fulfil the obligations or fails to comply with the restrictions which were imposed upon them by the court and, in the preliminary hearing, the judge for the preliminary hearing, or

f) avoids the enforcement of the imposed prison sentence or a monetary penalty or the execution of an alternative prison sentence for a monetary penalty.

(4) If the accused was left at liberty or released to liberty under Subsection 1 and any of the circumstances under Subsection 3 arise, the court may take the accused into custody if there are reasons for custody under Section 71 and for that purpose, the presiding judge, where appropriate, may even issue a warrant for arrest; the police officer and the public prosecutor proceed in the preliminary hearing under Section 86 and 87 Subsection 1 and the judge for the preliminary hearing proceeds under Section 87 Subsection 2, or under Section 73. If the accused was remanded in custody after their previous release from custody to liberty, for a further term of custody, Section 78 shall apply.

(5) The court and, in the preliminary hearing, the judge for the preliminary hearing that decided on the acceptance of bail, or if the reasons expired or changed that lead to its acceptance, shall revoke the bail upon a petition by the public prosecutor, the accused, or the person who paid it. If the accused was finally convicted to a prison sentence or a monetary penalty, or punishment by community service, the court may decide that the bail shall last to the date when the convicted person starts serving the prison sentence, or pays the monetary penalty, or performs the punishment by community service or pays the costs of the criminal proceedings. The accused, who was finally convicted to a monetary penalty, may also request that the guarantee which they paid be used for the payment of a monetary penalty or the satisfaction of the granted entitlement for damages.

(6) A complaint against the decision under Subsection 3, which has a suspensive effect, is admissible.

In the extradition procedure:

Section 504

Detention

(1) At the request of the foreign authorities, the public prosecutor who is competent to perform the preliminary investigation may give an order to a Police Force department to detain a person whose extradition will be requested by foreign authorities. Simultaneously, they are not bound by the reasons for custody under Section 71.

(2) After the prior consent of the public prosecutor, the Police Force department may detain a person for whom the foreign authorities declared a search, for the purposes of an extradition. Such person may be detained without such consent only if the matter does not allow any deferral and the consent may not be provided in advance.

(3) The public prosecutor shall be notified of the detention without undue delay. If the public prosecutor fails to release the detained person within 48 hours after the arrest, they shall submit to the court a petition for their remand into preliminary or extradition custody within this deadline.

Section 505

Preliminary Custody

(1) The presiding judge of the County Court shall decide on the petition of the public prosecutor for the remand of the detained person into preliminary custody within 48 hours after the submission of the detained person. Simultaneously, they are not bound by the reasons for detention under Section 71. If the presiding judge fails to remand the detained person into preliminary custody within the stated deadline, they shall release them to liberty.

(2) In the proceedings under Subsection 1, the competent court is the County Court in the jurisdiction of which the person was arrested or in which they reside.

(3) The purpose of the preliminary custody is to provide the presence of the detained person in the territory of the Slovak Republic until the State that is interested in the extradition of such person submits a request for their extradition under Section 498.

(4) Preliminary custody may not last more than 40 days from the date the person was apprehended. The presiding judge of the County Court, upon the petition of the public prosecutor performing the preliminary investigation, may decide on the release of the person from the preliminary custody.

(5) If during the duration of the preliminary custody a request for extradition from a foreign authority is delivered, the Ministry of Justice shall notify the public prosecutor performing the preliminary investigation. The presiding judge may remand such person into extradition custody upon their petition if the terms referred to in Section 506 Subsection 1 have been met.

(6) The release of such person from preliminary custody does not exclude their repeated remand into preliminary custody or their remand into extradition custody.

Extradition Custody

Section 506

(1) If it is necessary to ensure the presence of the requested person in the extradition proceedings in the territory of the Slovak Republic, or to prevent the obstruction of the purpose of such proceeding, the presiding judge of the County Court may remand them in extradition custody. They shall do so upon the petition of the public prosecutor performing the preliminary investigation.

(2) If the requested person consents to the extradition or if it was decided that the extradition abroad is admissible, the County Court shall remand such person in extradition custody, unless the presiding judge has already done so under Subsection 1.

(3) The presiding judge of the County Court shall order the release of the person from the extradition custody through an order on the day when the extradition of the person to the foreign authorities takes place, but no later than sixty days after the decision of the Minister of Justice on the permission of the extradition to a foreign State; in the case referred to in Section 507, it must be no later than sixty days after the day of the commencement of the enforcement of the extradition custody, provided the Minister of Justice decided on the permission of the extradition before such date. In addition, the presiding judge shall also order the release from extradition custody, if

a) the State that requested the extradition withdraws their request,

b) the Supreme Court decides that the extradition is inadmissible or the Minister of Justice did not authorise the extradition, or

c) the reasons for the extradition custody, release, or its implementation have expired.

Section 507

(1) If the requested person is in custody in connection with their criminal prosecution by the Slovak authorities, or is serving a prison sentence finally imposed by the Slovak court, the court shall remand the requested person in extradition custody, such custody shall remain.

(2) If the reasons for custody or the execution of punishment referred to in Subsection 1 have expired, the remaining term of the extradition custody shall expire and the requested person shall commence the execution of the extradition custody.

REPLY FROM SWITZERLAND

As a general rule, the person arrested with a view to extradition is detained in Switzerland during the extradition proceedings. However, according to the Swiss Act on International Mutual Assistance in Criminal matters of 20 March 1981 (IMAC), detention can be replaced by other measures, namely:

- If the person is unfit to remain in detention or if there are other valid reasons, the Federal Office of Justice (competent Swiss authority in extradition matters) may order measures other than detention to ensure his presence (art. 47, para. 2 IMAC). The Swiss Criminal Procedure Code of 3 October 2007 contains in Article 237 a non-exhaustive list of possible substitute measures, including bail and technical monitoring and supervision.
- By way of exception, the person concerned may be released from detention with a view to extradition at any stage of the proceedings if this is appropriate in the circumstances. The person may lodge a petition for release at any time (art. 50, para. 3 IMAC). The Swiss Criminal Procedure Code, especially Article 238–240, apply by analogy to release from detention.

Below you will find the link to the Swiss Act on International Mutual Assistance in Criminal matters of 20 March 1981 and to the Swiss Criminal Procedure Code of 5 October 2007 (the English translation has no legal force).

<http://www.admin.ch/opc/en/classified-compilation/19810037/index.html>

<http://www.admin.ch/opc/en/classified-compilation/20052319/index.html>

REPLY FROM UNITED KINGDOM

In the United Kingdom there are no separate provisions for Extradition Bail. The decision whether to grant bail is purely a matter for the courts who may set any conditions they see fit including reporting conditions, surrender of passport and or tagging. The conditions set will be such to reflect the court's view on the necessity of ensuring

- The person surrenders to custody,
- They do not commit an offence while on bail,
- They do not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,
- They make themselves available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

The law governing Bail in England Wales and Northern Ireland is

The Bail Act 1976

<http://www.legislation.gov.uk/ukpga/1976/63>

For Scotland

Criminal Procedures (Scotland) Act 1995

<http://www.legislation.gov.uk/ukpga/1995/46/contents>