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Addendum

EUROPEAN COMMITTEE ON CRIME PROBLEMS
COMITE EUROPEAN POUR LES PROBLEMES 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 sur la coopération dans le domaine pénal
(PC-OC)

COMPENDIUM OF ANSWERS TO THE QUESTIONNAIRE ON JURISDICTION AND TRANSFER OF PROCEEDINGS

COMPILATION DES REPONSES AU QUESTIONNAIRE SUR LA COMPETENCE JUDICIAIRE ET LA TRANSMISSION DES PROCEDURES

STATES / ETATS

FRANCE

A. Bonne transmission des procédures en application de la Convention européenne sur la transmission des procédures répressives (STE n° 73)

1. Si votre Etat n'est pas Partie à la Convention européenne de 1972 sur la transmission des procédures répressives, quelles sont les raisons de la non-ratification ? L'effet de la Convention sur la compétence judiciaire pose-t-il un problème ?

   Outre l'élargissement particulièrement important que la ratification d'une telle Convention aurait eu en matière de compétence, il doit être observé que le mécanisme institué par cet instrument n'est pas spécialement adapté pour tenir compte des systèmes fondés sur le principe de l'opportunité des poursuites.

   La France a ainsi estimé ne pas devoir signer la Convention européenne sur la transmission des procédures répressives, au motif notamment que sa législation nationale et les stipulations de la Convention européenne d'entraide judiciaire en matière pénale du 20 avril 1959 lui paraissent offrir un cadre à la fois suffisamment large pour permettre le transfert efficace de procédures pénales, et suffisamment souple de manière à préserver le principe fondamental de l'opportunité des poursuites et les règles nationales relatives à l'application de la loi pénale dans l'espace.

2. Votre Etat est-il en mesure de transmettre des procédures (et d'accepter de telles transmissions) sans base conventionnelle, c'est-à-dire sur la base de la législation interne et/ou sur celle de la réciprocité ?

   Oui, la transmission de procédure est possible (dans le sens actif et passif) sans base conventionnelle, sur le fondement de la réciprocité, dès lors que les faits sont constitutifs d'une infraction pénale au regard de la législation nationale.

3. Si votre Etat est Partie à la Convention européenne sur la transmission des procédures répressives :
   a. A quelle fréquence appliquez-vous la Convention en tant qu'Etat requérant et en tant qu'Etat requis ?
   b. Quels types d'affaires traitez-vous le plus souvent (s'agissant par exemple du type d'infraction et/ou de la sanction minimale et maximale infligée) ?
   c. Pouvez-vous donner une indication du taux de réussite des transmissions ?
   d. Quels obstacles juridiques et/ou pratiques avez-vous rencontré dans l'application de la Convention ?
   e. Quelles sont les considérations qui motivent la décision de requérir une transmission de procédure plutôt que d'engager des poursuites internes ?
   f. Avez-vous appliqué l'article 8, paragraphe 2, de la Convention, c'est-à-dire avez-vous requis ou accepté de poursuivre une personne étant définitivement condamnée ? A cet égard : avez-vous rencontré des problèmes concernant l'application du principe 'ne bis in idem' découlant de l'article 35 de la Convention ?
   g. Pensez-vous que les dispositions de la Convention et/ou son application pratique pourraient être améliorées ?

B. Dénonciation en application de l'article 21 de la Convention européenne d'entraide judiciaire en matière pénale de 1959 (STE n° 30)

4. En ce qui concerne le recours à l'article 21 de la Convention européenne d'entraide judiciaire en matière pénale de 1959 relative à la *dénonciation* :

   a. A quelle fréquence les autorités de votre pays recourent-elles à la possibilité de transmettre des informations à un autre Etat partie ?

      Entre le 1er janvier 2000 et le 1er septembre 2011, la France a adressé 1573 dénonciations officielles aux autres Etats parties à la Convention européenne d'entraide judiciaire en matière pénale. Ces données statistiques ne tiennent toutefois pas compte des dénonciations faites directement entre autorités judiciaires en application des dispositions de l'article 6.1 de

laConvention relative à l'entraide judiciaire en matière pénale entre les Etats membres de l'Union européenne du 29 mai 2000.

b. A quel pourcentage estimez-vous le nombre d'affaires pour lesquelles ces dénonciations donnent lieu à des mesures concrètes de la part de/dans la Partie requise, compte tenu de l'obligation de cette Partie de faire connaître la suite donnée à cette dénonciation (article 21, paragraphe 2) ?

La France n'est pas en mesure d'estimer ce pourcentage. En effet, bien souvent, en l'absence d'information transmise par l'Etat requis à la suite d'une dénonciation officielle, il n'est pas possible de déterminer si l'affaire a effectivement donné lieu à des actes d'enquête ou de poursuites de la part des autorités de la Partie requise.

c. Quelles sont les considérations qui motivent la décision de recourir à l'article 21 (STE n°30) plutôt que d'engager des poursuites internes ?

Les autorités françaises ont pour pratique de recourir aux dénonciations officielles prévues par l'article 21 de la Convention européenne d'entraide judiciaire dès lors :
- *qu'elles sont en mesure de déterminer de façon objective qu'une demande d'extradition n'aura pas de chance d'aboutir, quel qu'en soit le motif ;*
- *qu'il apparait, au regard des éléments de commission de l'infraction, que la Partie requise est mieux à même de mener les investigations.*

d. Rencontrez-vous des obstacles juridiques ou pratiques dans les suites à donner aux dénonciations adressées par une autre Partie en vue de poursuites pénales (y compris la phase préalable au procès ou de détention provisoire) de votre pays ? Veuillez préciser.

Les autorités judiciaires françaises n'ont pas signalé de tels obstacles à l'autorité centrale.

e. Avez-vous rencontré des problèmes concernant l'application du principe 'ne bis in idem', que ce soit en tant qu'Etat requérant ou requis ?

Les autorités judiciaires françaises n'ont pas signalé de tels problèmes à l'autorité centrale.

C. Transmission de procédures comme alternative à l'extradition : application du principe « *aut dedere, aut judicare* » en vertu de l'article 6, paragraphe 2 de la Convention européenne d'extradition (STE n° 24)

5. S'agissant de l'obligation d'extrader ou de poursuivre (*aut dedere, aut judicare*) énoncée à l'article 6, paragraphe 2 de la Convention européenne d'extradition de 1957 (STE n° 24) :

a. Merci de donner des informations sur la fréquence avec laquelle ce principe est mis en pratique lorsque votre Etat n'accorde pas l'extradition ou lorsque votre demande d'extradition est refusée par l'Etat requis.

Dans les cas où la France est Etat requérant, une dénonciation officielle des faits est en règle générale adressée à l'Etat requis.

Toutefois, dans l'immense majorité des cas, la nationalité de la personne recherchée est connue avant même que ne soit formée une demande d'extradition. Lorsqu'il est manifeste que l'intéressé est ressortissant de l'Etat requis, les autorités françaises privilégient d'emblée le recours à une procédure de dénonciation officielle, telle que prévue par l'article 21 de la Convention européenne d'entraide judiciaire.

Dans les cas où le France est Etat requis, conformément à l'article 6.2 de la Convention européenne d'extradition, si l'extradition est refusée par la France sur le fondement de la nationalité et si une dénonciation officielle est adressée par l'Etat requérant, des investigations seront menées et, le cas échéant, la personne sera poursuivie devant la juridiction française compétente.

Il convient de rappeler que l'extradition est une procédure de moins en moins mise en œuvre puisque le mandat d'arrêt européen remplace la procédure d'extradition entre plus d'une trentaine d'États et que la nationalité n'est pas un motif de refus dans le cadre de la procédure du mandat d'arrêt européen.

b. Appliquez-vous le principe *aut dedere, aut judicare* exclusivement dans les limites prévues à l'article 6, paragraphe 2 de la Convention d'extradition, c'est-à-dire dès lors que l'extradition est refusée *uniquement au motif de la nationalité* ou élargissez-vous son application à d'autres motifs de refus ?

L'article 113-8-1 du Code pénal français dispose que, sans préjudice des règles de compétence liées à la compétence personnelle active (auteur des faits de nationalité française), la loi pénale française est également applicable à toute infraction punie d'au moins cinq années d'emprisonnement commise hors du territoire français par un étranger dont l'extradition a été refusée pour l'un des motifs suivants :

- *la peine encourue dans l'Etat requis est contraire à l'ordre public français ;*
- *la personne réclamée aurait, en cas de remise, été jugée dans l'Etat requis par un tribunal n'assurant pas les garanties fondamentales de procédure et la protection des droits de la défense ;*
- *le fait à l'origine de la demande revêt le caractère d'infraction politique.*

c. Ce principe est-il appliqué en droit interne ?

Voir réponse ci-dessus au point C.5.b.

d. Quels sont les principaux obstacles à l'application de ce principe et pensez-vous qu'il soit nécessaire d'y remédier au moyen de normes ayant, ou n'ayant pas, force contraignante ?

La France, dans certains cas, doit obtenir une dénonciation officielle de l'Etat requérant ou une plainte de la victime avant de pouvoir initier des poursuites. Il s'agit des délits commis par des ressortissants français à l'étranger, ainsi que des délits commis à l'étranger par un ressortissant français ou étranger sur une victime française.

e. Votre pays envisage-t-il de modifier son droit interne en ce qui concerne le champ d'application du principe *aut dedere, aut judicare* ? Dans l'affirmative, dans quel sens et dans quelle mesure ?

La France examine actuellement la possibilité d'étendre les cas où elle pourrait se reconnaître comme compétente sur le fondement du principe « aut dedere, aut judicare ». En effet, deux obstacles sont apparus à l'occasion de demandes d'extradition qui ont été refusées mais pour lesquelles la mise en œuvre de l'article 113-8-1 du code pénal s'est avérée impossible :

- *d'une part, il est arrivé qu'un décret d'extradition soit annulé pour d'autres motifs que ceux visés à l'article 113-8-1 précité ;*
- *d'autre part, certains États ont refusé d'adresser une dénonciation officielle, considérant comme non fondé le refus d'extradition de la France au regard des risques ayant justifié le refus d'extradition (refus fondé sur le maintien de la peine de mort dans la législation malgré un moratoire du Gouvernement sur l'application de la peine de mort et une abolition de fait de cette peine).*

Un projet de loi comprenant certaines modifications de l'article 113-8-1 du code pénal a été soumis au Conseil d'État et devrait être soumis prochainement au Conseil des ministres puis au Parlement.

f. Avez-vous rencontré des problèmes concernant l'application du principe 'ne bis in idem' ?

A ce jour, les autorités judiciaires françaises n'ont pas signalé de telles difficultés à l'autorité centrale.

A ce titre, il doit être observé que la législation française énonce que nul ne peut être de nouveau poursuivi s'il justifie qu'il a été définitivement jugé à l'étranger pour les mêmes faits et, en cas de condamnation, qu'il a purgé l'intégralité de sa peine ou que sa peine est prescrite.

La jurisprudence a étendu ce principe aux personnes condamnées ayant fait l'objet d'une mesure de grâce.

En pratique, au regard de cette définition et des conditions posées par le droit français, il paraît peu probable en pratique qu'une difficulté liée à l'application du principe ne bis in idem puisse surgir dans l'exercice de poursuites par la France à l'encontre de l'un de ses ressortissants à la suite d'une dénonciation officielle fondée sur la règle « aut dedere, aut judicare ».

g. Pouvez-vous appliquer, et appliquez-vous, l'article 6, paragraphe 2, concernant les personnes déjà condamnées et/ou les personnes reconnues coupables pour lesquelles l'extradition est refusée au motif de la nationalité ou pour un autre motif, ou exigez-vous une base juridique de nature conventionnelle supplémentaire pour exécuter un jugement étranger contre une personne condamnée ?

La législation française ne permet pas à l'heure actuelle d'exécuter en France une condamnation prononcée dans un Etat tiers lorsque cette condamnation n'a pas fait l'objet d'un commencement d'exécution à l'étranger[1] dans la mesure où la France n'a pas ratifié la Convention européenne sur la valeur internationale des jugements répressifs du 28 mai 1970 (STE n°70).

Les seuls hypothèses envisageables de transfert de l'exécution d'une peine sont celles prévues :

- *dans le cadre de l'Union européenne et en particulier par l'article 4 de la décision-cadre 2002/584/JAI du Conseil du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres : cette disposition permet à l'Etat d'exécution de refuser la remise de l'un de ses ressortissants ou d'un résident à condition qu'il s'engage à assurer l'exécution de la peine à l'origine de l'émission du mandat d'arrêt européen ;*
- *dans le cas d'application de l'article 68 de la Convention d'application de l'accord de Schengen ;*
- *en application de l'article 2 du protocole additionnel à la convention sur le transfèrement des personnes condamnées du 18 décembre 1997 (STCE n°167).*

En dehors de ces cas, si l'extradition de la personne est refusée par la France sur le fondement de la nationalité française de l'intéressé, s'il apparait que la personne recherchée n'a pas été jugée définitivement pour les faits pour lesquels l'extradition a été demandée et si les conditions légales sont réunies, des poursuites pourront être engagées, sur le fondement de l'article 6.2 de la convention européenne d'extradition[2], si une dénonciation officielle des faits est adressée aux autorités françaises.

D. Questions générales

6. Pensez-vous que le Conseil de l'Europe devrait, en complément des normes existantes, agir en vue du règlement des conflits de compétence négatifs ou positifs ou élaborer des recommandations/lignes directrices pour améliorer leur mise en œuvre ?

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[1] Lorsqu'un français condamné à l'étranger a commencé à purger sa peine dans un État de condamnation lié par l'accord de Schengen (les États de l'Union européenne et les États associé (notamment l'Islande, la Norvège et la Suisse), l'article 68 de la Convention d'application de l'accord de Schengen permet de mettre à exécution le reliquat de la peine. Ainsi une demande d'extradition visant un français qui s'est évadé sera refusée au motif de sa nationalité mais sera mise à exécution sur le fondement de cet article 68.

[2] Le fait que l'extradition soit refusée au motif de la nationalité n'exclut pas que d'autres motifs de refus d'extradition auraient pu faire obstacle à son extradition (par exemple la prescription des faits ou l'absence d'une peine d'emprisonnement supérieure ou égale à deux ans) et fasse obstacle à l'engament de poursuite en France (prescription des faits, absence d'incrimination en France, immunité personnelle, etc.). La plupart des conventions bilatérales d'extradition précisent, contrairement à la convention d'extradition du 13 décembre 1957 que le principe « aut dedere, aut judicare » ne s'applique que lorsque l'extradition est refusée au **seul** motif de la nationalité.

En ce qui concerne les conflits de compétence positifs, le thème a déjà été traité au sein de l'Union européenne et a donné lieu à l'adoption de la décision-cadre 2009/948/JAI du Conseil du 30 novembre 2009 relative à la prévention et au règlement des conflits en matière d'exercice de la compétence dans le cadre des procédures pénales. La négociation de cet instrument a mis en évidence la grande complexité du sujet. Au demeurant, force est de constater que ladite directive ne fixe aucune règle contraignante et n'impose qu'une obligation de dialogue : les autorités compétentes doivent « [prendre] contact avec l'autorité compétente de [l'] autre État membre pour obtenir confirmation de l'existence de cette procédure parallèle », engager des contacts directs et les autorités de l'autre État ont une obligation de répondre.

En ce qui concerne les conflits de compétence négatifs, la situation semble encore plus délicate.

En outre, quand bien même la poursuite est juridiquement possible en cas de refus d'extradition, soit au motif de la nationalité de la personne demandée soit pour tout autre motif (peine de mort encourue, considérations humanitaires, etc.), il semble très difficile de mener à bien un procès sur le seul fondement des éléments mentionnés dans une demande d'extradition sans avoir copie du dossier et des éléments de preuve déjà recueillis dans l'État requérant. Il conviendrait en conséquence de favoriser la mise en œuvre rapide des dénonciations officielles à la suite de refus d'extradition et encourager l'exécution efficace des demandes d'entraide qui pourraient être émises à la suite de l'application du principe aut dedere, aut judicare.

En dernier lieu, le développement de bonnes pratiques tendant à faciliter l'échange d'informations et le suivi de dénonciations officielles faites entre Etats parties devrait être soutenu.

7. Veuillez détailler votre réponse pour ce qui est de la « bonne » transmission des procédures (Convention sur la transmission des procédures), de la dénonciation (article 21, Convention européenne d'entraide judiciaire en matière pénale) et du principe *aut dedere, aut judicare* (article 6, paragraphe 2, Convention d'extradition).

8. Veuillez indiquer, le cas échéant, toute remarque, information ou proposition pertinente pour les thèmes couverts par le présent questionnaire.

GERMANY / ALLEMAGNE

A. Proper transfer of proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)

1. If your State is not Party to the European Convention on the Transfer of Proceedings in Criminal Matters of 1972, what are the reasons for the non-ratification? Is the effect of the Convention on jurisdiction considered a problem?

Germany has neither signed nor ratified the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters of 1972. The German judicial authorities use the provisions of Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters in order to submit requests to other States for the transfer of criminal prosecution. This runs smoothly with many States, which is why Germany has had and continues to have no reason to believe that the 1972 Convention, as an addition to the existing legal framework, should lead to any real improvements in practice.

With regard to the transfer of criminal prosecution, a fundamental distinction should be made between three possible scenarios: (1) The requesting State does have jurisdiction. It requests that another State take over the criminal prosecution. This constitutes a typical case for the application of Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters. (2) Both States have jurisdiction according to the applicable law. Strictly speaking, this is also not a case of criminal prosecution being transferred from one State to another. Rather, one State refrains from pushing ahead with its proceedings in favour of the other State. These possible scenarios can be solved without any problems also using Article 21 of the European Convention on Mutual Assistance in Criminal Matters. (3) The requested State does not have jurisdiction. In this case, jurisdiction is established only with the transfer of the criminal prosecution. Any such retrospective extension of national laws concerning the applicability of criminal law, as provided for by Article 2 of the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972, would cause constitutional problems for Germany. This holds true in particular to the extent that this jurisdiction (i.e.

the applicability of German criminal law) is tied to procedural circumstances that arise only after the offence. Unlike in other Member States of the European Union, the provisions in Germany of sections 3 et seqq. of the Criminal Code (*Strafgesetzbuch*, StGB) governing the applicability of criminal law are also subject to the strict ban on retroactivity stipulated by Article 103 (2) of the Basic Law (*Grundgesetz*, GG). Fundamentally, this means that German criminal law must already have been applicable at the time the offence was committed, and that such applicability may not be established simply by a subsequent transfer of proceedings or any other subsequently arising circumstances.

Furthermore, there is no discernable practical need for such provisions. The question of whether there is the need to establish jurisdiction by means of such transfer will potentially depend on the scope of the extraterritorial jurisdiction of the judicial system of the State in question. However, we believe that such provisions not only create new jurisdictions; they create new potential conflicts of jurisdiction as well.

2. Is your State able to transfer proceedings (and accept such transfers) without a treaty basis, i.e. on the basis of domestic legislation and / or on the basis of reciprocity?

In Germany, the question of taking over criminal prosecution hinges on whether German law is applicable, since this is prerequisite to having the domestic competence to prosecute. If German law is applicable, the transfer can be effected without further regulation by a treaty. If Germany does not have the jurisdiction to prosecute, however, prosecution cannot be taken over either on a treaty or on a non-treaty basis (see response to question 1). As a rule, it is unlikely that a proposal will be made for another State to take over proceedings (on a non-contractual basis) because of the lack of prospect that this will succeed.

B. Laying of information under Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)

9. Concerning the use of Article 21 of the European Convention on Mutual Assistance in Criminal Matters of 1959 on *laying of information*:

a. How frequently is the possibility to transmit information to another State Party used by your authorities?

Because no statistical records are kept by the German public prosecution offices on requests for criminal prosecution to be taken over, this figure can only be estimated. Furthermore, numbers vary depending on the size of the public prosecution office and its proximity to the border. According to the estimates, there are approximately 24 transmissions per annum in the smaller *Länder* (Thuringia), and over 600 transmissions per annum in the larger *Länder* (Bavaria).

b. What is your evaluation of the percentage of cases where this information leads to concrete action by/in the requested Party, based on the obligation of the requested Party to give notification of any such action (Article 21, paragraph 2)?

The number of cases where the requested State takes concrete action and notification thereof is given can also only be estimated because of a lack of statistics. Generally, with exceptions, the public prosecution offices estimate this percentage to be rather high (average of approx. 80%). However, considerable differences arise depending on the requested State.

Most public prosecution offices report a considerable number of cases were requests are answered only after several subsequent enquiries have been made, and in some cases following considerable delays of up to several years. In isolated cases, the involvement of the EJN contact has made it possible for the necessary information to be obtained.

c. **What are the considerations that motivate the decision to utilise Article 21 (ETS No. 30) rather than to pursue a domestic prosecution?**

Prosecution authorities decide on the application of Article 21 if criminal prosecution is not possible in the Federal Republic of Germany. This is the case if absolute procedural impediments exist under German law, e.g. German prosecution authorities cannot establish jurisdiction in accordance with German provisions governing the applicability of the country's criminal law (sections 3-7 of the Criminal Code).

Alternatively, Article 21 is applied if criminal prosecution in Germany has little prospect of success. This is the case, for example, if the perpetrator is abroad and, because of legal impediments, cannot be extradited or extradition would be disproportionate with regard to the anticipated penalty (see no. 145 of the Guidelines on Relations with Foreign Countries in Criminal Law Matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*, RiVASt). Or if the proceedings are conducted against a juvenile or young adult who is mainly resident abroad, meaning that any measures imposed by a youth court could not be implemented or could only be implemented with great difficulty in Germany.

Furthermore, Article 21 is applicable if the public prosecution office considers that criminal prosecution abroad would be considerably more favourable in practical terms. This is the case, for example, if evidence is located in the requested State, if criminal proceedings with the same subject-matter have already made major progress in the requested State, or if the perpetrator has already committed further acts of a similar nature in the requested State.

d. **Do you face any legal or practical obstacles in acting on information laid by another Party with a view to criminal proceedings (including the first stage pre-trail or trial proceedings) of your country? Please provide details.**

Practitioners have reported only isolated legal problems. This is the case, for example, if the limitation period for the offence underlying an incoming request has already expired according to German law. Furthermore, deadlines under German law for submitting a request to prosecute (which is required for certain offences) may constitute a problem in isolated cases as well. To this extent it is questionable, for example, whether these deadlines can also be complied with when the proceedings are transferred to a foreign authority.

A lot more frequently it is practical problems that are reported. For example, the translation of files sent by the requesting State makes for a heavy workload. Occasionally, the files that are transmitted are also incomplete or are no longer up-to-date. This makes it more difficult, for example, to investigate and summon witnesses. Often, for the institution of investigation proceedings in Germany, it is also necessary to have exact knowledge of the relevant criminal provisions and procedural rules applicable abroad. The need to research these from Germany often creates a disproportionately large amount of work, which in certain cases may even result in a refusal to take over proceedings. Often, investigative measures that would need to have been taken in the requesting State also delay the further course of the proceedings. Finally, problems also arise for German authorities and courts if a particularly large number of foreign witnesses must be heard during the main court hearing. This is often extremely time-consuming and entails significant costs.

e. Did you encounter problems with respect to the application of the principle of 'ne bis in idem', either as the requesting or the requested State?

Hardly any problems arise in Germany with regard to the principle of *ne bis in idem*. In isolated cases, criminal prosecution authorities report difficulties regarding the scope of this principle and when exactly it applies. These occur, for example, if the proceedings in the requested State have been concluded with a type of decision that is unfamiliar to the requesting State. Frequently, details have to be requested – often on several occasions – from the authorities of the requested foreign State about the decision that concluded the proceedings in order to be able to solve any questions concerning *ne bis in idem*.

Conversely, for a State making a request pertaining to specific offences, it may not be entirely clear from the conviction whether these offences also form the basis of the conviction.

C. Transfer of proceedings as an alternative to extradition: the application of the 'aut dedere, aut judicare' principle under Article 6, paragraph 2, of the European Convention on Extradition (ETS No. 24)

10. Concerning the obligation to extradite or prosecute as contained in Article 6, paragraph 2, of the European Convention on Extradition of 1957 (ETS No. 24) – the *aut dedere aut judicare* principle:

a. Please provide information on how often this principle is applied in practice in cases where your state does not grant extradition, or where your extradition request is refused by the requested state.

Here too there are no statistical indications. The prosecution authorities estimate that this principle is hardly applied, the probable reason for this being that many extraditions take place in accordance with

the provisions of Council Framework Decision of 13 June 2002 (2002/584/JHA) on the European arrest warrant, which then override this principle in relation to such extraditions. It should also be noted, however, that the prosecution authorities abroad are often aware that Germany does not extradite its own citizens and, conversely, German prosecuting authorities are also frequently aware if other States follow the same procedure, which means that extradition requests are not submitted in such cases in the first place.

b. **Do you apply the aut dedere aut judicare principle exclusively within the limits of Article 6§2 of the Extradition Convention, i.e. insofar as the extradition was refused solely for reason of nationality or do you widen its application to other grounds for refusal of extradition?**

and

c. Is this principle implemented in your internal legislation?

Since German prosecuting authorities are already obliged by the principle of mandatory prosecution (section 152 (2) of the German Code of Criminal Procedure, StPO) to launch investigations if sufficient factual indications exist – which may also arise from an incoming extradition request – there has not been any need for the additional express implementation of this principle in domestic law. Section 7 (2), no. 1 of the German Criminal Code (perpetrator was a German at the time of the offence or became one thereafter) thus provides the connecting factor through which German prosecuting authorities establish jurisdiction.

Investigations are therefore launched directly in accordance with German law governing the applicability of criminal law (sections 3-7 of the Criminal Code) upon refusal of the extradition exclusively on the grounds of citizenship, and not with reference to the principle of *aut dedere aut judicare* set forth in Article 6 (2) of the Extradition Convention.

d. What are the main obstacles to the application of this principle and do you feel a need to address such obstacles through binding or non-binding standards?

To the extent that obstacles exist in individual cases, these of a purely practical nature. There is therefore no need for regulation.

e. Does your country contemplate any change in its domestic legislation concerning the scope of application of the aut dedere, aut judicare principle? If so, in which direction and to what extent?

No.

f. Have you had any problems regarding the 'ne bis in idem' principle?

The criminal prosecution authorities of the *Länder* have not reported any such problems.

g. Can and do you apply Article 6, paragraph 2, with respect to already convicted and/or sentenced persons where extradition is denied on nationality or other grounds, or do you require a further treaty basis to execute a foreign judgment against a convicted person?

The enforcement of judgments issued in a foreign State proceeds independently of any preceding extradition proceedings and is governed by sections 48 et. seqq of the Act on International Legal Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*, IRG) to the extent that no special treaty provisions exist, e.g. Convention on the Transfer of Sentenced Persons of 21 March 1983 (section 1 (3) IRG). The enforcement of a foreign judgment cannot be founded on Article 6 (2) alone.

D. General questions

11. Do you think that there is any need for action at Council of Europe level to tackle positive or negative conflicts of jurisdiction in addition to the existing standards or for recommendations/guidelines to be drafted to improve their implementation?

7. Please specify for 'proper' transfer of proceedings (Convention on the Transfer of Proceedings), laying of information (Article 21 of the Convention on Mutual Assistance in Criminal Matters) and aut dedere aut judicare (Article 6, paragraph 2, of the Convention on Extradition).

The Ministry does not presently perceive any corresponding need for regulation either from a practical or a substantive perspective. At most, improvements could potentially be made in practice in relation to other Member States with the creation at Council of Europe level of suitable rules of procedure, including procedural deadlines. The aim could therefore be to provide uniform and binding procedural rules for all Member States according to which the justice authorities of a Member State may transfer running investigation or criminal proceedings to the justice authorities of another Member State. Consideration could be given, for example, to uniform and binding standards for processing information laid pursuant to Article 21 of the Convention on Mutual Assistance in Criminal Matters, which would establish a duty to transmit immediately a confirmation of receipt as well as a time limit of no more than three months for a decision on the taking over of investigations.

8. If appropriate, please indicate any comments, information or proposals of relevance to the issues covered by this questionnaire.

No further comments appear necessary.

Legal provisions cited

Criminal Code (*Strafgesetzbuch*, StGB)

Version: New version by promulgation of 13 November 1998 I 3322;
last amended by Article 4 of the Act of 23 June 2011 I 1266

Section 3: Applicability to offences committed on the territory of the Federal Republic of Germany

German criminal law shall apply to acts committed on the territory of the Federal Republic of Germany.

Section 4: Offences committed on German ships and aircraft

German criminal law shall apply, regardless of the law applicable in the place where the act was committed, to acts committed on a ship or an aircraft entitled to fly the federal flag or the nationality mark of the Federal Republic of Germany.

Section 5: Offences committed abroad against domestic legal interests

German criminal law shall apply, regardless of the law applicable in the place where the act was committed, to the following acts committed abroad:

1. Preparation of a war of aggression (section 80);

2. High treason (sections 81 to 83);

3. Endangering the democratic state governed by the rule of law

   a) in cases under sections 89, 90a (1) and 90b if the perpetrator is German and has the centre of his life within the territorial scope of this act, and

   b) in the cases under sections 90 and 90a (2);

4. Treason and endangering national security (sections 94 to 100a);

5. Offences against the national defence

   a) in cases under section 109 and sections109e to 109g, and

   a) in cases under sections 109a, 109d und 109h if the perpetrator is German and has his the centre of his life within the territorial scope of this act;

6. Abduction and casting political suspicion on another (sections 234a, 241a) if the act is directed against a German who has his domicile or usual residence in Germany;

6a. Abduction of a minor in cases under section 235 (2) no. 2, if the act is directed against a person who has his domicile or usual residence in Germany;

7. Violation of business or trade secrets of a business located within the territorial scope of this act, an enterprise which has its registered place of business there, or an enterprise with its registered place of business abroad which is dependent on an enterprise with its registered place of business within the territorial scope of this act and constitutes with it a group;

8. Offences against sexual self-determination

a) in cases under section 174 (1) and (3) if the perpetrator and the person against whom the act was committed are Germans at the time of the act and have the centre of their lives in Germany, and

b) in cases under sections 176 to 176b and 182 if the perpetrator is a German;

9. Termination of pregnancy (section 218) if the perpetrator at the time of the act is a German and has the centre of his life within the territorial scope of this act;

10. False unsworn testimony, perjury and false affirmations in lieu of an oath (sections 153 to 156) in a proceeding pending before a court or other German agency within the territorial scope of this act which is competent to administer oaths or affirmations in lieu of an oath;

11. Offences against the environment in cases under sections 324, 326, 330 and 330a, which were committed within the area of Germany's exclusive economic zone, to the extent that international conventions on the protection of the sea permit their prosecution as criminal offences;

11a. Offences under section 328 (2), nos. 3 and 4, as well as subsections (4) and (5), also in conjunction with section 330, if the perpetrator is a German at the time of the act;

12. Acts committed by a German public official or a person with special public-service obligations during an official stay or in connection with his duties;

13. Acts committed by a foreigner as a public official or a person with special public-service obligations;

14. Acts which someone commits against a public official, a person with special public-service obligations, or a soldier of the Bundeswehr during the discharge of his duties or in connection with his duties;

14a. Bribery of a member of parliament (section 108e) if the perpetrator is a German at the time of the act or if the act was committed in relation to a German;

15. Trafficking in organs and human tissues (section 18 of the Transplantation Act) if the perpetrator is a German at the time of the act.

Section 6: Acts committed abroad against internationally protected legal interests

German criminal law shall further apply, regardless of the law applicable at the place of their commission, to the following acts committed abroad:

1. (repealed)

2. Crimes involving nuclear energy, explosives and radiation in cases under sections 307 and 308 (1) to (4), section 309 (2) and section 310;

3. Assaults against air and maritime transport (section 316c);

4. Trafficking in human beings for the purpose of sexual exploitation and for the purpose of the exploitation of labour, as well as assisting in the trafficking in human beings (sections 232 to 233a);

5. Unauthorized distribution of narcotics;

6. Dissemination of pornographic writings in cases under sections 184a, 184b (1) to (3) and 184c (1) to (3), also in conjunction with section 184c, first sentence;

7. Counterfeiting of money and securities (sections 146, 151 and152), of guaranteed payment cards and blank Eurocheques (section 152b (1) to (4), as well as the preparation thereof (sections 149,151,152 and 152b (5));

8. Subsidy fraud (section 264);

9. Acts which, on the basis of an international agreement binding on the Federal Republic of Germany, are to be prosecuted even if they are committed abroad.

Section 7: Applicability to offences committed abroad in other cases

(1) German criminal law shall apply to acts committed abroad against a German if the act is a criminal offence at the place of its commission or if that place is not subject to any criminal jurisdiction.

(2) German criminal law shall apply to other acts committed abroad if the act constitutes a punishable offence at the place of its commission or if that place is not subject to any criminal law jurisdiction, and if the perpetrator

1. was a German at the time of the offence or became a German after the commission of the offence, or

2. was a foreigner at the time of the offence, is discovered in Germany and, although the extradition law would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or extradition cannot be executed.

Guidelines on Relations with Foreign Countries in Criminal Law Matters (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*, RiVASt)

Version: 8 December 2008

No. 145: Conditions for an outgoing prosecution request

(1) If a person is being prosecuted on the territory of the Federal Republic of Germany for a criminal offence for which extradition cannot be granted (cf. no. 88) or for a regulatory offence, but is resident abroad, the prosecution authorities shall ascertain whether prosecution is to be requested of the foreign State. The principle of proportionality shall be observed in doing so.

(2) The same shall be done if a request for assistance in enforcement (cf. no. 105) cannot be granted.

Code of Criminal Procedure (*Strafprozessordnung*, StPO)

Version: New version by promulgation of 7 April 1987 I 1074, 1319;
last amended by Article 5 of the Act of 23 June 2011 I 1266

Section 152

(1) The public prosecution office shall have the authority to prefer public charges.

(2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

Act on International Legal Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*, IRG)

Version: New version by promulgation of 27 June 1994 I 1537;
last amended by Article 1 of the Act of 18 October 2010 I 1408

Section 1: Scope of application

(1) Relations with foreign countries relating to legal assistance in criminal matters are governed by this Act.

(2) Criminal matters within the meaning of this Act include proceedings relating to an act which, pursuant to German law, constitutes a regulatory offence and is punishable with a regulatory fine or which, pursuant to foreign law, is subject to a comparable penalty, provided a court also with jurisdiction in criminal matters can determine this penalty.

(3) Provisions of international agreements shall supersede the provisions of this Act provided they constitute directly applicable national law.

(4) Support for proceedings in criminal matters with another Member State of the European Union shall be governed by this Act.

Part IV: Legal assistance by enforcement of a foreign decision

Section 48: General principle

Legal assistance may be provided for proceedings in a criminal matter in the form of enforcement of a final and binding penalty or other penalty imposed abroad. Part IV of this Act shall also be applicable to requests for the enforcement of an order for forfeiture or confiscation handed down by a court in the requesting State not having jurisdiction over criminal matters, provided that the order is based on a punishable offence.

Section 49: Additional permissibility criteria

(1) Enforcement shall be permissible only

1. if a competent authority of the foreign State has requested it, submitting the complete, legally binding and enforceable decision;
2. if, in the proceedings on which the foreign decision is based, the sentenced person has had an opportunity to be heard in accordance with the law, has been provided with an adequate opportunity for defence, and the penalty has been imposed by an independent court or, in the event of a regulatory fine, has been imposed by an authority whose decision may be appealed to an independent court;
3. if, also under the law in force in the area of application of this Act, notwithstanding any procedural bars and, if need be, on analogous application of the facts, a criminal penalty, a measure of reform and prevention or a regulatory fine could have been imposed in respect of the act forming the basis of the foreign decision or, where the enforcement of an order for forfeiture or confiscation is requested, such an order could have been made notwithstanding section 73 (1), second sentence, of the Criminal Code;
4. if the limitation period for enforcement has not expired under the law in force in the area of application of this Act, or would not have expired after analogous conversion of the facts, and
5. if no decision of the type described in section 9 (1) has been made.

(2) If a penalty entailing deprivation of liberty has been imposed in a foreign State and the sentenced person is present there, enforcement shall further be admissible only if the sentenced person, after having been informed of his rights, has consented to it and this consent has been recorded by a judge of the requesting State or by a German career consular official who is empowered to authenticate expressions of intent. Any such consent cannot be revoked.

(3) Enforcement shall not be permissible if the law in force in the area of application of this Act does not provide for any penalties equivalent in type to the penalties which have been imposed in the foreign State.

(4) Where a ruling has been handed down in the foreign order for forfeiture or confiscation concerning the rights of third parties, it shall be binding unless

a) the third party has not been given sufficient opportunity to assert his rights, or

b) the ruling is incompatible with a civil ruling handed down in the same matter in the area of application of this Act, or

c) the decision relates to third-party rights to real estate or to an interest real estate located on federal territory; third-party rights shall also include priority notices.

(5) Deprivation or suspension of a right, a prohibition and loss of a capacity shall extend to the area of application of this Act if an international agreement approved by law in accordance with Article 59 para. 2 of the Basic Law so provides.

Section 50: Subject-matter jurisdiction

The decision regarding the enforceability of a foreign decision shall be made by the Regional Court. The public prosecution office at the Regional Court shall prepare the decision.

Section 51: Local jurisdiction

(1) Local jurisdiction for the decision regarding the enforceability of a foreign decision shall be determined by the place of residence of the person convicted.

(2) If the person convicted does not have a place of residence in the area of application of the Act, jurisdiction shall be determined on the basis of the place where he has his habitual place of residence, or, if such a place cannot be established, at his last place of residence, otherwise at the place where he had been apprehended, or, in the event that he was not apprehended, where he was first located. If the request is exclusively for the enforcement of an order for forfeiture or confiscation or of a criminal or regulatory fine, jurisdiction shall be exercised by the court in the district where the object to which the forfeiture or confiscation pertains is located, or, if the forfeiture or confiscation does not pertain to a particular object, or the enforcement pertains to criminal or regulatory fines, by the court in the district where the sentenced person's assets are located. If the assets of the sentenced person are located in the districts of various Regional Courts, jurisdiction shall be determined according to which Regional Court is seized of the matter, or, if no Regional Court has yet dealt with the matter, which public prosecution office at the Regional Court dealt with the matter first.

(3) If venue pursuant to para. 1 cannot be established, it shall lie at the seat of the Federal Government.

Section 52: Preparation of the decision

(1) If the documents submitted are insufficient to permit a decision on the permissibility of the enforcement, the court shall render its decision only after the requesting State has been given the opportunity to submit additional documents.

(2) Section 30 (1), second sentence; subsection (2), second and fourth sentences; subsection (3), and section 31 (1) and (4) shall apply *mutatis mutandis*. If the convicted person is located within the area of application of this Act, section 30 (2), first sentence, and section 31 (2) and (3), shall also apply *mutatis mutandis*.

(3) Prior to the decision, the convicted person as well as any third persons who, depending on the circumstances of the case, may assert rights with regard to the object in the case of a request for enforcement of a foreign order for forfeiture or confiscation, must be given the opportunity to make statements.

Section 53: Counsel

(1) The convicted person as well as any third persons who, depending on the circumstances of the case, may assert rights with regard to the object in the case of a request for enforcement of a foreign order for forfeiture or confiscation, shall be able to avail themselves of the assistance of legal counsel at any stage in the proceedings.

(2) If the convicted person has not yet chosen a legal counsel, an attorney shall be assigned to him,

1. if, on account of the complexity of the factual and legal situation, the assistance of legal counsel appears necessary;
2. if it is apparent that the person convicted cannot himself adequately exercise his rights, or
3. if the convicted person is being held in custody outside the area of application of this Act and there are doubts as to whether he himself can adequately exercise his rights.

(3) The provisions of Chapter 11 of Part 1 of the Code of Criminal Procedure, with the exception of sections 140, 141 (1) to (3), and section 142 (2) shall apply *mutatis mutandis*.

Section 54: Conversion of the foreign penalty

(1) To the extent that the enforcement of the foreign decision is permissible, the decision shall be declared enforceable. At the same time, the penalty imposed therein shall be converted into the most closely equivalent penalty under German law. The foreign decision shall be decisive insofar as the severity of the penalty to be established is concerned; however, it may not exceed the maximum penalty imposable for the offence in the area of application of this Act. This maximum penalty shall be replaced by a maximum of two years' deprivation of liberty if, in the area of application of this Act, the offence is punishable

1. by a maximum of two years' imprisonment or
2. as a regulatory offence, by a financial penalty, whereas in accordance with the second sentence the foreign penalty is to be converted into a penalty involving deprivation of liberty.

(2) When converting a criminal fine or regulatory fine, the sum of money calculated in foreign currency shall be converted into Euros at the exchange rate prevailing when the foreign decision was given.

(2a) Where a forfeiture or confiscation order concerns a specific object, the declaration of enforceability shall relate to this object. Where it is determined in terms of value, subsection (2) shall apply *mutatis mutandis.*

(3) When converting a penalty imposed on a juvenile or a young adult, the provisions of the Youth Court Act shall apply *mutatis mutandis*.

(4) Any part of the sentence already served by the convicted person in respect of the offence in the requesting State or in a third State as well as any detention suffered pursuant to section 58 shall be deducted from the penalty to be established. Where such deduction has not been made at the time of the decision on enforceability or where the conditions for it to be made are fulfilled subsequently, the decision shall be amended.

Section 55: Decision concerning enforceability

(1) The Regional Court shall rule on the enforceability by issuing a court order. To the extent that the foreign decision is declared enforceable, the decision as well as the type and degree of severity of the penalty to be enforced shall be indicated in the operative part of the decision.

(2) The public prosecution office at the Regional Court, the convicted person and any third persons who have asserted rights with regard to the object in the case of a request for enforcement of a foreign order for forfeiture or confiscation may lodge the remedy of immediate complaint against the order of the Regional Court. For the further procedure, section 42 shall apply *mutatis mutandis*.

(3) A copy of the final and binding decisions made by the court shall be transmitted to the Federal Central Criminal Register. This shall not apply to the extent that the penalty imposed in the foreign decision has been converted into a regulatory fine or the subject-matter of the final and binding decision is exclusively an order for forfeiture or confiscation. If the foreign decision is to be entered into the Federal Central Criminal Register, the decision on enforceability shall be noted in the entry. Sections 14 to 18 of the Federal Central Criminal Register Act shall apply *mutatis mutandis*. If the decision pertains to a foreign order for forfeiture and the circumstances of the case give cause to assume that the person aggrieved by the offence underlying the order, who does not constitute a third party at the same time, has obtained an enforceable judgment on the territory of the Federal Republic of Germany pertaining to the damage he has suffered as a result of the offence, a copy of the final and binding decision shall be transmitted to the court exercising local jurisdiction pursuant to section 32 of the Code of Civil Procedure in order for the aggrieved party to be informed.

Section 56: Grant of legal assistance

(1) Legal assistance may be granted only if the foreign decision has been declared enforceable

(2) The decision regarding the granting of legal assistance shall be forwarded to the Federal Central Criminal Register. Section 55 (3), second to fourth sentences, shall apply *mutatis mutandis*.

(3) If legal assistance is granted, the offence may no longer be prosecuted under German law.

(4) The granting of a request for legal assistance that aims at the enforcement of an order for forfeiture or confiscation shall be equivalent to a final and binding order and decision within the meaning of sections 73d, 74e of the Criminal Code.

Section 56a: Compensation of the aggrieved person

If, in the case of a request for enforcement of a foreign order for forfeiture, the aggrieved person does not constitute a third party at the same time and if he has suffered damage as the result of the offence underlying the foreign order, he or his legal successor shall, upon application, be compensated from the State Treasury to the extent that at the time the request is received by the competent authority an enforceable decision has been made by a German court on the claim for compensation. The amount of compensation shall be restricted by the value of the assets declared forfeited. If a number of aggrieved persons have obtained such a decision, the compensation of these persons shall be determined by the order in which they submitted their applications. The application shall be inadmissible if two years have passed since the granting of the request for legal assistance aimed at the enforcement of an order for forfeiture.

Section 57: Enforcement and execution

(1) After the granting of legal assistance, the public prosecution office that is competent pursuant to section 50, second sentence, shall carry out the enforcement as enforcing authority.

(2) The enforcement of the remainder of a penalty involving deprivation of liberty may be suspended on probation. The provisions of the Criminal Code shall apply *mutatis mutandis*.

(3) The decision pursuant to subsection (2) and subsequent decisions which pertain to the suspension of a sentence on probation shall be rendered by the court with jurisdiction pursuant to section 462a (1), first and second sentences, of the Code of Criminal Procedure or, if jurisdiction pursuant to these provisions cannot be established, the court with jurisdiction for the decision pursuant to section 50.

(4) The provisions of the Youth Court Act shall apply mutatis mutandis to enforcement of a penalty which has been converted to a penalty permissible in accordance with the Youth Court Act (*Jugendgerichtsgesetz*).

(5) Enforcement of the converted penalty shall be governed by those provisions which would be applicable to a penalty imposed in the area of application of this Act.

(6) Enforcement shall not be carried out if a competent authority of the requesting state advises that the conditions for enforcement have ceased to exist.

Section 58: Detention to ensure enforcement

(1) Detention for the purpose of ensuring enforcement of a penalty entailing deprivation of liberty may be ordered against the sentenced person if a request for enforcement within the meaning of section 49 (1) no. 1 has been received, or if, prior to receipt of a request for enforcement, a competent authority in the requesting State makes a request for such detention, providing details of the offence that has led to the sentence, the time and place it was committed and as exact a description of the sentenced person as possible, provided, on the basis of certain facts, that

1. there is reason to suspect that the sentenced person will evade the proceedings relating to enforceability or enforcement, or
2. there is reason for the strong suspicion that he will improperly obstruct the investigation of the truth in the enforceability proceedings.

(2) The court having jurisdiction pursuant to section 50 shall make the decision regarding detention. Sections 17, 18, 20 and 23 to 27 shall apply *mutatis mutandis*. The Higher Regional Court shall be substituted by the Regional Court; the public prosecution office at the Higher Regional Court shall be substituted by the public prosecution office at the Regional Court. The remedy of complaint shall be admissible against decisions of the Regional Court.

(3) Section 67 (1) shall apply *mutatis mutandis* if the request for enforcement relates to a criminal fine, a regulatory fine or an order for forfeiture or confiscation.

(4) Subsections (1) and (3) shall not apply if it appears from the outset that enforcement will not be permissible.

Basic Law for the Federal Republic of Germany

Version: last amended by Article 1 of the Act of 21 July 2010 I 944

Article 103

(1) In the courts every person shall be entitled to a hearing in accordance with the law.

(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed.

(3) No person may be punished for the same act more than once under the general criminal laws.

RUSSIA / RUSSIE

A Proper transfer of proceedings under the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)

2. Question: Is your State able to transfer proceedings (and accept such transfers) without a treaty basis, i.e. on the basis of domestic legislation and / or on the basis of reciprocity?

Answer: Yes, it can in accordance with Articles 458, 459 of the Criminal Procedure Code of the Russian Federation.

3. Question: If your State is a Party to the European Convention on the Transfer of Proceedings in Criminal Matters:

a. Question: How frequently do you apply the Convention as the requesting State and as the requested State?

Answer: Since the date of its coming into force for the Russian Federation (27 September 2008) the Convention was used by the Russian Federation as a requesting state on one occasion (a request to the Ukraine).

The Prosecutor General Office of the Russian Federation received from the competent authorities of foreign states 10 requests for criminal proceedings based on the Convention (6 – from the Ukraine, 2 from Bulgaria; 2 – from Latvia).

b. Question: What are the types of cases most often dealt with (e.g. in terms of type of offence and / or minimum and maximum sentence)?

Answer: Most often the cases dealt with are based on the requests for criminal proceedings in connection with the crimes against the life and health (homicides, inflicting grave bodily injuries and other), crimes against ownership (theft, fraud, open stealing, assault with intent to rob).

c. Question: Can you provide an indication of the 'success-rate'?

Answer: On one occasion as a requesting State. On ten occasions as a requested State.

e. Question: What are the considerations that motivate the decision to request a transfer of proceedings rather than to pursue a domestic prosecution?

If a crime is committed in the Russian Federation by a foreign national who later left its territory, and his participation in the proceedings in Russia seems to be impossible, all the materials of the instituted and investigated criminal case will be forwarded to the competent authorities of the foreign state of the person's citizenship for his criminal prosecution.

f. Question: Did you apply article 8, paragraph 2 of the Convention, i.e. did you request or accepted to prosecute a person who was finally sentenced? In this respect: did you encounter problems with respect to the application of the principle of 'ne bis in idem' under article 35 of the Convention?

Answer: Since the date of the Convention coming into force for the Russian Federation (since 27 September 2008) paragraph f of Article 8 of he Convention has never been applied.
One of the reservations made by the Russian Federation when it ratified the Convention is as follows:
«The Russian Federation declares in accordance with paragraphs (h) of Appendix 1 to the Convention, that it will apply Part V of the Convention to the extent that this does not conflict with the principle of inadmissibility of a double conviction for the same crime».
The reservation with regard to the application of Part V of the Convention to the extent that this does not conflict with the principle of inadmissibility of a double conviction for the same crime is made to conform with the provisions of the Constitution of the Russian Federation (Part 1 Article 50) and the Criminal Code of the Russian Federation (Part 2 of Article 6) which set forth the *ne bis in idem* principle.

g. Question: Do you see any scope for the improvement of the provisions of the Convention and / or its practical implementation?

Answer: We believe it is necessary to work out a document within the Council of Europe which will set standards for the contents and form of the request for criminal proceedings.

From a practical point of view when forwarding the materials of a criminal case to the competent authorities of the requested State with the view of a criminal proceedings it would be helpful to indicate if there is a procedural decision on instituting a criminal case. In our opinion this will allow to determine without mistake the stage of the criminal proceedings in accordance with the legislation of the requested State and to avoid double receipt of evidence in the case provided earlier by the requesting State.

B. Laying of information under Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)

4. Concerning the use of Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters on *laying of information*:

a. Question: How frequently is the possibility to transmit information to another State Party used by your authorities?

Answer: Where a person who has committed a crime in the Russian Federation and later left its territory has double citizenship, and his extradition or transfer of proceedings with a request for his criminal prosecution abroad seems impossible, the copies of the criminal files are sent to the relevant foreign state for a decision to be taken in accordance with the legislation of this state.

b. Question: What is your evaluation of the percentage of cases where this information leads to concrete action by/in the requested Party, based on the obligation of the requested Party to give notification of any such action (Article 21, paragraph 2)?

Answer: As regards requests related criminal proceedings the competent authorities of the requested States reply to all of them. The Russian Federation forwards the information to the competent authorities of the requested States in each criminal case.

c. Question: What are the considerations that motivate the decision to utilise Article 21 (ETS No. 30) rather than to pursue a domestic prosecution?

Answer: Where a person who has committed a crime in the Russian Federation and later left its territory has double citizenship, and his extradition or transfer of proceedings with a request for his criminal prosecution abroad seems impossible, the copies of the criminal files are sent to the relevant foreign state for a decision to be taken in accordance with the legislation of this state.

d. Question: Do you face any legal or practical obstacles in acting on information laid by another Party with a view to criminal proceedings (including the first stage pre-trail or trail proceedings) of your country? Please, provide details.

Answer: It is often difficult to determine the stage of the criminal proceedings because sometimes we receive separate documents without any procedural decision on instituting a criminal case.

e. Question: Did you encounter problems with respect to the application of the principle of 'ne bis in idem', either as the requesting or the requested State?

Answer: No, we did not.

C. Transfer of proceedings as an alternative to extradition: the application of the 'aut dedere, aut judicare' principle under Article 6, paragraph 2, of the European Convention on Extradition (ETS No. 24)

5. Concerning the obligation to extradite or prosecute as contained in Article 6, paragraph 2, of the European Convention on Extradition of 1957 (ETS No. 24) – the *aut dedere aut judicare* principle:

a. Question: Please provide information on how often this principle is applied in practice in cases where your state does not grant extradition, or where your extradition request is refused by the requested state.

Answer: It is always applied in the cases when the extradition request is refused on the ground that the sought person has a Russian citizenship.

b. Question: Do you apply the *aut dedere aut judicare* principle exclusively within the limits of Article 6§2 of the Extradition Convention, i.e. insofar as the extradition was refused *solely for reason of nationality* or do you widen its application to other grounds for refusal of extradition?

Answer: It may be used also where there are other grounds for refusal of extradition, but only within the limits of the Russian jurisdiction in accordance with the law or international treaties of the Russian Federation.

c. Question: Is this principle implemented in your internal legislation?

Answer: Yes. In accordance with Article 12 of the Criminal Code of the Russian Federation foreign citizens and stateless persons not residing permanently in the Russian Federation who committed a crime outside the territory of the Russian Federation are criminally liable under this Code in cases where the crime was committed against the interests of the Russian Federation or against a citizen of the Russian Federation or against a stateless person permanently residing in the Russian Federation and also in cases provided for by the international treaty of the Russian Federation, unless foreign citizens and stateless persons who do not permanently reside in the Russian Federation were convicted in a foreign state and are prosecuted in the territory of the Russian Federation.

d. Question: What are the main obstacles to the application of this principle and do you feel a need to address such obstacles through binding or non-binding standards?

Answer: We have no obstacles to the application of this principle.

e. Question: Does your country contemplate any change in its domestic legislation concerning the scope of application of the *aut dedere, aut judicare* principle? If so, in which direction and to what extent?

Answer: We do not have official information on this issue.

f. Question: Have you had any problems regarding the 'ne bis in idem' principle?

Answer: There have been no problems in connection with carrying out criminal proceedings.

g. Question: Can and do you apply Article 6, paragraph 2, with respect to already convicted and/or sentenced persons where extradition is denied on nationality or other grounds, or do you require a further treaty basis to execute a foreign judgement against a convicted person?

Answer: In order for a foreign judgement to be enforced in the Russian Federation in respect of the convicted person a treaty basis is required.

D. General questions

6. **Question:** Do you think that there is any need for action at Council of Europe level to tackle positive or negative conflicts of jurisdiction in addition to the existing standards or for recommendations/guidelines to be drafted to improve their implementation?

Answer: Due to a short-time experience in the Russian Federation of application of the Convention it seems impossible to provide a substantiated opinion on this question.

7. **Question:** Please specify for 'proper' transfer of proceedings (Convention on the Transfer of Proceedings), laying of information (Article 21 of the Convention on Mutual Assistance in Criminal Matters) and *aut dedere aut judicare* (Article 6, paragraph 2, of the Convention on Extradition).

Answer: The following examples can illustrate successful co-operation in the transfer of proceedings with regard to the criminal cases received:

- from the Swiss Confederation in respect of the citizen of the Russian Federation, convicted by the judgment of the Moscow City Court of 26.01.2007 for the commission of homicide and illegal deprivation of freedom. He was sentenced to 19 years of imprisonment with serving punishment in a correctional colony with a strict regime;
- from the Republic of Cyprus in respect of the citizen of the Russian Federation, convicted by the judgment of the Chelyabinsk District Court of 12.05.2009 for the commission of assault with robbery and homicide. He was sentenced to 14 years of imprisonment with serving punishment in a correctional colony with a strict regime.
  Here is one of the examples where Russia was a requesting state.

On 27.07.2009 a criminal case was forwarded to the Ministry of Justice of the Federal Republic of Germany pursuant to Article 6 (2) of the European Convention on Extradition of 13.12.1957 in respect of the German citizen who was suspected of the commission of a crime, specified in Article 264 (5) of the Criminal Code of the Russian Federation (violation by a person driving a vehicle of rules for road traffic, which caused, by negligence, the death of two persons).

According to the information of the Ministry of Justice of the Federal Republic of Germany in accordance with the order of the Munster local court of 04.11.2009 a conditional punishment was imposed on him for a term of one year with a 2 year probation period.

SAN MARINO / SAINT-MARIN

With reference to the "Questionnaire on jurisdiction and transfer of proceedings", prepared by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters within the European Committee on Crime Problems (CDPC) and received through diplomatic channels, the

Department of Foreign Affairs of the Republic of San Marino, although for the time being a San Marino expert cannot take part in the activity of the CDPC, wishes to answer to the questions of the questionnaire, taking into account the importance of such fact-finding investigation in the Council of Europe's Member States.

In this regard, the following information is provided, on the basis of relevant indications received by the San Marino Court (criminal section) :

- As regards letter A) of the Questionnaire, the Republic of San Marino is one of those States which have not signed the European Convention on the Transfer of Proceedings in Criminal Matters of 1972. Therefore, given the fact that San Marino has not acceded to said Convention and has not any relevant domestic legislation in place, the Court has not yet transferred any criminal proceedings.

- As far as letter B) on the laying of information is concerned (both from San Marino to other States and from other States to San Marino), the data relating to 2011 show that since the start of the year 8 criminal proceedings have been initiated at the San Marino Court following acts directly transmitted by the prosecution service of another State (whereas in 2010 such situation occurred at least once, since it was possible to check only part of 2010 data).

In such situations, the information laid has been treated as any other *notitia criminis* and, therefore, it has led to the initiation of a domestic criminal proceeding, as the principle of mandatory prosecution applies.

On the other hand, in cases where the Court has declared its lack of jurisdiction (only few cases, i.e. about 5 cases every year), acts have been transmitted to the competent judicial authorities, except in those cases where the victim of the offence had also lodged a complaint in the other State.

San Marino has recently ratified the European Convention on Mutual Assistance in Criminal Matters (on 16 March 2009). At present, Article 21 of the Convention has not been invoked, but it should be stressed that the judgements delivered on the basis of information laid by a foreign authority are notified at the time of execution.

It is worth recalling that the Court has no data concerning communications between Ministries of Justice, if any. Furthermore, the "*ne bis in idem*" principle has not been applied in practice.

- With regard to letter C), it should be stressed that after the ratification of the European Convention on Extradition (through Parliamentary Decree no. 28 of 16 March 2009), the request for extradition has been refused only in one case and solely because the person to be extradited was a San Marino national (and, therefore, not for other reasons).

Always with reference to the specific case, given the fact that the person to be extradited gave himself up to the requesting authority, there were no reasons to apply the procedure referred to in Article 6, paragraph 2 of the Convention on Extradition.

As no other cases have occurred, it is not possible to report any obstacles to the application of the principle referred to in the above-mentioned Article.

However, it should be pointed out that there is not any domestic legal framework regulating the scope of the "*aut dedere aut judicare*" principle.

Prior to the ratification of the Convention on Extradition, a San Marino national served a sentence imposed by the Court of another State in the territory of the Republic of San Marino on the basis of a bilateral Convention.