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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
PC-OC

Questionnaire concerning judgements in absentia and the possibility of retrial

**Proposals by delegations on a draft prepared by Mr Miroslav Kubíček
(Czech Republic)**

During its 61st meeting the PC-OC discussed a draft questionnaire concerning judgments and absentia and possibility of retrial in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition. The PC-OC agreed that it would be important to further develop the questionnaire and decided:

- to invite delegations to send written proposals for the development of the questionnaire to the Secretariat
- to instruct the Secretariat to amend the draft questionnaire in the light of proposals received, and
- to instruct the PC-OC-Mod to finalise the draft questionnaire for consideration by the PC-OC plenary at its next meeting.

The Secretariat received proposals from the following delegations: Denmark, Finland, Germany, Ukraine and the Russian Federation. The proposals are appended to this paper. The Secretariat inserted the proposals in the existing questionnaire. An exception was made for the very comprehensive German proposal, which it proposes to consider separately

- Draft -

Finland proposes to introduce the questionnaire with a definition of “judgements in absentia”:

“In absentia decision is a decision rendered following a trial at which the person concerned did not appear in person although he was summoned in person and thereby informed of the scheduled date and place of the trial (or he actually received by other means official information of the trial); and received such information in due time to allow him to participate in the trial and to effectively exercise his or her right of defence.”

1. Is it possible in your State to issue a judgement in absentia? If so, how are these judgements defined? If there are more types of such judgements or in absentia proceedings, please, provide information on each of them.

2. Does the summons to the accused contain information about the possibility of the Court to render a judgment in absentia ? **(Denmark)**

3. What guarantees does the law of your State provide concerning the right to a legal counsel for the accused during in absentia proceedings ? **(Denmark)**

4. Does the law of your State provide for a possibility of retrial in case of a judgement in absentia? If so, what conditions need to be met for retrial to be granted? If there are more types of such judgements or in absentia proceedings, please, provide information on each of them.

5. If retrial needs to be requested by the convicted and sentenced person and/or granted by a court or other authority, please provide information on the procedure (including the deadline for filing such a motion and the start date of this deadline).

6. In respect of Article 3 of the Second Additional Protocol to the European Convention on Extradition what does the legislation and/or judicial practice of your State mean under the notion “minimal rights of defence”, which the requesting Party should guarantee to the person who is subject to extradition and in relation to whom a judgment was rendered in absentia. **(Russian Federation)**

7. Does the legislation of you State provide for such a ground for refusal to extradite a person with the aim of execution of a sentence as the rendering of a judgment in absentia of this person? If yes, is it an imperative or provisional ground of refusal? **(Russian Federation)**

Ukraine proposes to widen the scope of the questionnaire beyond the extradition Convention with the following questions.

8. If a State takes over the execution of a judgment in absentia in accordance with Article 8 of the Convention on the transfer of proceedings in criminal matters, please provide the information whether a retrial needs. If so, what does a retrial mean and what conditions need to be met for retrial to be granted? **(Ukraine)**

9. If the sentenced State has not taken measures to a person to avoid his escape from the country between pronounce a judgment and entry of judgment into legal force, but has applied to him a departure from a country, which had been done before a judgment has entered into force - please provide information on conditions of basis of which a judgment in absentia can be acceptable in the another State. **(Ukraine)**

Delegations are kindly asked to fill in the requested information into the attached chart in order to facilitate its processing.

Country	Type of in absentia proceedings /judgement	Definition	Possibility of retrial	Conditions for retrial	Procedure to be followed	Deadline(s) <i>including possibility and conditions for prolongation</i>
			yes / no			

The information provided will be compiled by the Secretariat into a comprehensive document that will be published at the public website of the PC-OC among the tools for implementation in the extradition section (and other sections if it is decided to widen the scope of the questionnaire). The replies will also serve as background for further discussion of the PC-OC and PC-OC Mod on the topic of in absentia judgements, extradition and guarantees to be provided under Article 3(1) of the Second Additional Protocol to the European Convention on Extradition. (and provisions on in absentia of other Conventions if it is decided to widen the scope of the questionnaire)

DENMARK

Below please find the Danish contribution to the questionnaire on “in absentia” cases.

If possible, please incorporate the context of the questions posed below into the questionnaire .
Please do not hesitate to rephrase the wording.

- 1) Does the summons to the accused contain information about the possibility of the Court to render a judgment in absentia?
- 2) What guarantees does the law of you State provide concerning the right to a legal counsel for the accused during an in absentia proceeding?

Sincerely,

Christiane Mygind

FINLAND

In absentia

10.2.2012

Regarding the draft questionnaire (Document PC-OC (2011) 22) concerning judgements in absentia and the possibility of retrial I would like to comment the following:

The proposed questions, as such, seem to me clear enough. However, I would like to refer to what I already said in the last meeting: In my opinion there should be a definition what “judgement in absentia” means. Only after definition the questions can be answered properly. Practically, I suggest that we should add an introductory clause that would include a rough definition about judgement in absentia.

Having said this, I presume, it is my duty to propose some kind of definition about judgement in absentia. My first reaction for the formulation is that in absentia means that the defendant has been informed about the trial, but he chooses voluntarily not to come to the hearing. When thinking this situation from the Finnish law perspective, several questions come to my mind. For instance, in Finland the main rule is that the accused person must always be summoned, there are no other possibilities. If the person chooses not to be present, the decision is not regarded as in absentia decision. Secondly, nowadays there are also written procedures, where real “hearings” are not organised – this could not be classified in absentia either. In sum, I think that in Finland there are no in absentia proceedings at all. As a result, to answer the following questions after question 1 is useless. But to answer the questions without the definition is impossible. On the other hand, to enlarge the definition would not be wise either, since there must be endless number of variations of proceedings.

Regarding the definition my suggestion could be: “In absentia decision is a decision rendered following a trial at which the person concerned did not appear in person although he was summoned in person and thereby informed of the scheduled date and place of the trial (or he actually received by other means official information of the trial); and received such information in due time to allow him to participate in the trial and to effectively exercise his or her right of defence.” However, in absentia questions have recently been on the agenda also in the European Union, Therefore, it is fair to refer directly the EU Framework decision (2009/299/JHA), especially its preamble provisions and Article 2.

Merja Norros

GERMANY

Response: _____ (Country)

Proposed additions for a questionnaire on Decisions in absentia**Questionnaire**

If your domestic law provide for more than one decision rendered in the absence of the person concerned at trial, for more than one type of a retrial or for more than one extradition procedure please provide information for each of the decisions, retrials or extradition procedures separately if the regulation or proceeding defer from each other.

Criteria for decisions rendered in the absence of the person concerned at the trial

1. Does your domestic law provide for the possibility of issuing decisions in the absence of the person concerned at the trial? If so, please describe the regulation (e.g. convictions or other kind of decisions for example confiscation orders or compensations imposed for the benefit of victims) and the proceeding.
2. Are the following decisions according to your domestic law considered as decisions in absentia ? (Multiple responses possible)

- ☐ All decisions rendered in the absence of the person concerned at trial
- ☐ Decisions rendered in the absence of the person concerned but who was defended by a legal counsellor at the trial:
- ☐ Only if the counsellor had been given a mandate by the person concerned
 - ☐ Regardless of whether the person was defended by a duty counsellor appointed by the court with no contact to the person concerned
- ☐ Decisions rendered in the absence of the person concerned who afterwards
- ☐ Has expressly stated that he or she does not contest the decision;
 - ☐ Did not request a retrial¹ within the applicable time frame.

¹ „Retrial“ is used as a generic term without prejudice to the proceeding chosen by the legal systems of the States. The wording follows the linguistic use of the European Court of Human Rights

3. Does your domestic law provide for the notification of the person concerned regarding the scheduled date and place of the trial which resulted in the decision? If so, please describe the proceeding (e.g. summons in person and/or by other means; official information; etc.).
4. Does your domestic law provide for the following safeguards with regard to the notification of the person concerned about the scheduled date and place of the trial (Multiple responses possible)
- a) ☐ The person concerned is informed in such a manner that it is unequivocally established that he or she was aware of the scheduled trial;
 - b) ☐ The person concerned is informed in a language that he or she understands;
 - c) ☐ The person concerned receives information in due time meaning sufficiently in time to allow him or her to participate in the trial and to effectively prepare and exercise his or her right of defence (if so, please provide information as to the time limit);
 - d) ☐ The scheduled date of the trial may for practical reasons initially be expressed as several possible dates within a short period of time (if so, please describe the regulation)

5. Does your domestic law provide in addition for the notification of the person concerned that a decision may be handed down if he or she does not appear for the trial?
6. Does your domestic law provide for the possibility that the person concerned waives his or her right to appear and defend him-/herself at trial, explicitly or implicitly, through his or her conduct?
7. If so, does your domestic law provide for the possibility that the person concerned, who has waived his or her right to appear, is defended at the trial by a legal counsellor whom he or she has given a mandate?

Criteria for a retrial in case of a decision rendered in the absence of the person concerned at the trial

8. Does your domestic law provide for the possibility of a retrial in case of a decision rendered in the absence of the person concerned at the trial? If so, please describe the regulation (e.g. retrial or appeal; ex officio or only on request of the person concerned)

9. Are there specific conditions to be met by the person concerned in order to be entitled to such a retrial? If so please provide information on the procedure (time limit for a request, if necessary; beginning of the time limit; burden of proof that the conditions are met; etc.)

10. Is the person concerned informed about his or her right to a retrial and, where applicable, about the specific conditions to be met?

☐ No

☐ Yes

☐ Yes, in a language that he or she understands.

11. Is the person concerned entitled to participate in the retrial?

12. Is the retrial considered according to your domestic law as a new trial meaning the trial starts anew with all possible appellate remedies (e.g. as if the decision rendered in the absence of the person concerned never existed) or is it rather considered as one extraordinary remedy?

13. During the retrial, does your domestic law provide for a fresh determination of the merits of the charge, in respect of both law and facts, including possible new evidence?

14. Does your domestic law provide for the possibility that the original decision rendered in the absence of the person concerned is reversed?

☐ No

☐ Yes, but only in favour of the defendant

☐ Yes, in favour but also to the detriment of the defendant.

15. Does the retrial or the request of a retrial by the person concerned suspend the execution of the decision rendered in the absence of the person concerned?

Extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered in the absence of the person concerned

16. Are you extraditing a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered in the absence of the person concerned? If so, please describe the regulation (or identify the convention or legal instrument that you would apply).

17. Do you understand Article 3 of the Second Additional Protocol to the European Convention on Extradition as follows: if the requesting party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence, it means that

- ☐ the person claimed has a concrete right to a retrial or
- ☐ the person concerned has only the right that the possibility of a retrial is considered by the requesting state?

18. If a person is extradited to your state for the purpose of carrying out a sentence or detention order imposed by a decision rendered in the absence of the person concerned, is there a time limit for him or her to request a retrial, if necessary? If so, when does this time limit begin to run?

19. Is the person concerned informed about this time limit?

- ☐ No
- ☐ Yes
- ☐ Yes, in a language that he or she understands.

20. Is there a time limit within which the retrial has to (re)start? If not, can you provide an assessment of the approximate time before a retrial will start in such a case, especially if the person concerned is detained?

21. If the person concerned was not been personally served with the decision before his or her surrender, when will the person concerned receive a copy of the decision (if possible, please provide an approximate time frame)?

22. Will the person concerned receive such a copy in a language that he or she understands?

23. If the person concerned, after being surrendered, has exercised his or her right to a retrial, are you considering the detention of the person as an enforcement of the decision rendered in absentia or as provisional detention?

24. In both cases, is the detention of that person awaiting a retrial reviewed until the retrial proceedings are finalised? (Multiple responses possible)

☐ No

☐ Yes, on a regular basis

☐ Yes, upon request of the person concerned.

25. If so, does such a review include the possibility of suspension or interruption of the detention?

Contact person / Person responsible for responding to the questionnaire:

Ms / Mr:

Title / position:

Authority:

Postal address:

E-mail address:

Telephone number:

Fax number:

RUSSIAN FEDERATION

I suggest that the following provisions be included in the questionnaire:

1. In respect to Article 3 of the Second Additional Protocol to the European Convention on Extradition – what does the legislation and/or judicial practice of your State mean under the notion “minimal rights of defence”, which the requesting Party should guarantee to the person who is subject to extradition and in relation to whom a judgment was rendered in absentia.

2. Does the legislation of your State provide for such a ground for refusal to extradite a person with the aim of execution of a sentence as the rendering of a judgment in absentia of this person? If yes, is it an imperative or provisional ground of refusal?

Concerning the questions contained in the table, I'd like to have some explanations what is it meant under the notion “type of in absentia proceedings/judgment” (it is desirable to have some examples) and under the term “definition”.

In the last column I suggest putting a question about the possibility and terms of prolongation of the deadlines indicated.

Vladimir Zimin

UKRAINE

The draft questionnaire, prepared by Mr Miroslav Kubicek, concerns a judgments in absentia and the possibility of retrial under Article 3 of the Second Additional Protocol to the European Conventions on extradition of 1957 (ETS 24).

However, the issues of judgments in absentia and taking over the execution of such judgments are provided for by others conventions, in particular, by Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS 167), the European Convention of International Validity of Criminal Judgments (ETS 070), the European Convention on the Transfer of Proceedings in Criminal Matters (ETS 073).

Unfortunately, there are not definitions and clear explanations of the meaning "a judgments in absentia" in accordance with these Conventions. For example, Art.8 Para 2 of the Convention on the transfer of proceedings in criminal matters foresees the possibility to transfer by the sentenced State a judgments (including passed in absentia) for execution by the another State if the extradition is impossible, but herewith the conditions for acceptance and retrial of such judgments, imposed to the person in his/her absence, are not provided for by provisions of the Convention as well as in the explanatory reports.

Taking into account the above, it would be practically useful to supplement the draft questionnaire with the following questions:

1. If a State takes over the execution of a judgment in absentia in accordance with Article 8 of the Convention on the transfer of proceedings in criminal matters, please provide the information whether a retrial needs. If so, what does a retrial mean and what conditions need to be met for retrial to be granted?
2. If the sentenced State has not taken measures to a person to avoid his escape from the country between pronounce a judgment and entry of judgment into legal force, but has applied to him a departure from a country, which had been done before a judgment has entered into force - please provide information on conditions of basis of which a judgment in absentia can be acceptable in the another State.