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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

Working paper
Outline for draft guidelines on practical measures to improve co-operation in respect of transfer of proceedings

Prepared by the Secretariat and updated further to the discussions held in the 62nd meeting of the PC-OC

Draft guidelines on practical measures
to improve co-operation in respect of transfer of proceedings
inter alia in application of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and Article 6, paragraph 2 of the European Convention on Extradition[1].

Background

The PC-OC decided at its 60th plenary meeting to send out a questionnaire to all delegations related to the transfer of proceedings and jurisdiction so as to gather information about the application of the relevant Council of Europe instruments and to assess the need for initiatives to improve their effectiveness or for the development of a new instrument in this field.

The following instruments and/or specific provisions were covered by the questionnaire
- The European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)
- Laying of information under Article 21 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)
- 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)

The questionnaire, its introductory note and the compendium of replies are contained in Document PC-OC(2011)14. A summary of the replies is contained in Document PC-OC (2011) 16 rev.

The PC-OC considered, at its 61st plenary meeting, the replies to the questionnaire as well as the follow-up to be given and decided:

- to develop practical guidelines, if appropriate contained in a legal instrument, in respect of transfer of proceedings *inter alia* in application of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and Article 6, paragraph 2 of the European Convention on Extradition. The guidelines would *inter alia* address the following issues:
  - bilateral consultation between the requesting and the requested states before, during and after (feedback) the submission of requests for co-operation;
  - proportionality of the case with regard to the procedure initiated and the appropriateness of submitting the request;
  - ways to accelerate and facilitate procedures so as to avoid impunity while lowering costs and efforts involved (eg. by suggested time limits to react to a request; development of a model form for submitting requests, including a coversheet and/or a summary; reconsider translation requirements and burden of costs);
  - ways to deal with differences in national legislation as regards extraterritorial jurisdiction;
    admissibility of evidence, and mandatory and discretionary prosecution;

- to instruct its working group, the PC-OC Mod, to elaborate draft guidelines for consideration at its next plenary meeting;
- to keep the CDPC informed on future developments.

[1] *Including regional multilateral and bilateral agreements and treaties such as the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.*

The PC-OC Mod discussed, during its 13th meeting, the outline for draft guidelines prepared by the Secretariat and decided to ask the Secretariat to amend the draft outline on the basis of the discussions held and to present it to the PC-OC plenary for consideration and further guidance. Due to a lack of time, the PC-OC Mod did not finish the discussions on the draft guidelines 4 and 5 under chapter B.

The PC-OC Mod also discussed the possible status of the guidelines. It considered the possibility of appending them to a recommendation or declaration of the Committee of Ministers to member states but decided to postpone further discussion on this point until the content and nature of the guidelines are defined.

General introduction (rationale of the guidelines)

In reply to the questionnaire on transfer of proceedings and jurisdiction sent out in 2011 to members of the PC-OC, many delegations reported practical difficulties in applying transfer of proceedings on the basis of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and of Article 6, paragraph 2 of the European Convention on Extradition.

Any decision to transfer proceedings serves to determine which jurisdiction is in the best position to prosecute, in the interest of justice and to avoid impunity. However, each legal instrument mentioned above has its own legal procedure and conditions to be observed. In addition, each case is unique and any decision for transfer should therefore be taken on its individual facts and merits.

In taking these individual decisions, national authorities will observe the interest and good administration of justice which include not only legal considerations - the respect of the law, the relevant international legal instrument and fundamental principles of law (such as the *ne bis in idem* principle)- but also practical considerations (such as avoiding unnecessary costs).

Guidance on the legal considerations can be found in the explanatory reports to the provisions of the relevant legal instruments, as well as in the various recommendations of the Committee of Ministers related to them. Particular reference is hereby made to Recommendation R(79) 12 concerning the application of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73). The texts of all relevant standards and reports are to be found on the website of the PC-OC (www.coe.int/tcj)

Guidance on the practical considerations, establishing a good practice for authorities so as to accelerate and facilitate procedures, to avoid unnecessary efforts or costs, is still lacking. The present guidelines aim therefore at facilitating the practical aspects of the application of the legal instruments and its specific provisions mentioned above by proposing a step by step check-list of procedure for the requesting and the requested state.

These guidelines address all practitioners involved in the application of the relevant conventions, including, but not only, the central authorities of States Parties.

One of the key elements for co-operation is the existence of a reliable list of contact points between Parties. The need for Parties to ensure a regular update of the list of officials involved in the practical application of the European Convention on Extradition and the European Convention on mutual assistance in criminal matters as well as of the network of single points of contact is hereby underlined.

Guidelines[2]

A. Guidelines to the Requesting State

When considering making a request concerning transfer of proceedings, laying of information etc, requesting states should:

1. Consider the legal basis allowing for transfer of proceedings, including the treaties ratified by the requested state, the declarations attached and the national legislation with regard to the jurisdiction of the requested state and other issues of relevance. Attention should also be paid to the different alternatives to transfer of proceedings such as:
- the possibility to request extradition or, for EU member states, to issue a European Arrest Warrant
- the possibility, for Schengen states, to make use of alerts pursuant to Article 98 of the Schengen Convention
- the possibility to make use of alternative requests under the European Convention on mutiual assistance in criminal matters (temporary transfer of a person to the requesting state, hearings by videoconference)

2. Consider the proportionality of the case with regard to the procedure initiated as well as its appropriateness taking into account the need to combat impunity, the efficiency of proceedings and the specific requirements of the convention to be applied .

Transfer of proceedings to another state might notably be considered appropriate if that state has jurisdiction and can achieve the purpose of criminal proceedings more effectively. In this context account should be taken of the following considerations:[3]:
a. the nationality and place of residence of the suspected person;
b. the possibility that the suspected person is undergoing or is to undergo a prison sentence in the requested state;
c. the place where the offence occurred and/or where the most important items of evidence can be found;
d. the possibility that proceedings are being taken against the suspected person for the same or different offences in the requested state;
e. the practicability to deal with all the prosecutions in the jurisdiction of the requested state in cases where the offence(s) occurred in several jurisdictions;
f. that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting state and that his or her presence in person at the hearing of proceedings in the requested state can be ensured;
g. the willingness and ability of witnesses to travel and give evidence in the jurisdiction of the requested state;
h. the interests of victims and whether they would be prejudiced, for example in their possibilities to claim compensation, if any prosecution were to take place in one jurisdiction rather than another
i. the likelihood that the enforcement in the requested state of a sentence, if one were passed, will improve the prospects for the social rehabilitation of the person sentenced
j. the likelihood that the requesting state could not itself enforce a sentence, if one were passed, even by having recourse to extradition, and that the requested state could do so.

3. Decide as soon as possible whether or not to request transfer of proceedings.

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[2] *The guidelines are drafted in very general terms. Is it necessary to add technical details or requirements for each type of request (transfer of proceedings, laying of information under MLA, or Art 6§2 of the extradition convention)?.*

[3] *The PC-OC Mod felt that this issue needed further discussion on how to adapt the criteria to different conventions and other requirements.*

4. Before submitting the request, proceed, if necessary, with an informal preliminary consultation (for example by phone, e-mail or videoconference) with the requested state so as to discuss:

- the appropriateness and potential successfulness of the request envisaged
- ways to deal with differences in national legislation (eg. extraterritorial jurisdiction; admissibility of evidence, mandatory or discretionary prosecution.)[4] ;
- the timeframe and practicalities of the co-operation (contact persons, special elements to be included in the request, translation requirements and costs etc).

3. Submit the request, taking into account the outcome of the informal consultation where this applies, using, for example, the model form presented in the appendix to these guidelines.

4. If considered necessary by either the requested or the requesting state, have consultations on the progress of, or any difficulties raised by the request (for example to ensure that the request is clearly understood, complete and that evidence is admissible and agree on a timeline/date for decision on the request).

B. Guidelines to the Requested State

In order to facilitate co-operation the requested state should:

1. If the requesting state asked for an informal preliminary consultation as mentioned under Chapter A, guideline 2, provide clear indications on the legal and practical issues of importance to a successful and rapid follow-up to the request;

2. Once the request has been received, confirm receipt without delay, while specifying the files received and indicating the contact details of the person in charge of the request/ the case manager;

3. If a request received is unclear or incomplete, consult the requesting state without delay. Facilitate informal consultation with the requesting state, for example by promoting direct contact between prosecutors involved in a particular case;

4. Take all possible measures to ensure that a decision on [the acceptance of] the transfer of proceedings to the judicial authorities is taken within a reasonable delay /the timeframe agreed. If unforeseen delays occur, inform the requesting country accordingly.

5. Once the decision has been taken:
   - to accept the request for transfer of proceedings, keep the requesting state informed on the follow-up of the case by the judicial authorities;
   - to reject the request, inform the requesting state about the reasons.

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[4] *It might be considered that the guidelines, instead of proposing a case by case discussion on differences in legislation, contain some more general considerations on how to deal with issues such as extraterritorial jurisdiction, admissibility of evidence, and mandatory or discretionary prosecution.*